Supreme Court, U.S.
FILED

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No. 93-468 SEP 14 1994

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In The
Supreme Court of the United States
October Term, 1993

TONY LEE, RAMACHANDRAN PALISSERY, RALPH TALARICO, EVE ARNOLD, AND, DAVID WEST, for themselves and all those similarly situated,

Petitioners,

v.

THE LIFE INSURANCE COMPANY OF NORTH AMERICA, THE UNIVERSITY OF RHODE ISLAND, MR. BLAISE MORRISSEY, AND, THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS BOARD OF GOVERNORS FOR HIGHER EDUCATION, individually, jointly and severally, in their corporate, official, and personal capacities,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

SINCLAIR T. BANKS, Counsel of Record, 79B Frank Avenue, West Kingston, R.I. 02892, Tel. (401) 783-6155. KEVEN A. McKENNA, 23 Acorn Street, Providence, R.I. 02903. *Attorneys for Petitioners.*

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QUESTIONS PRESENTED

Students at the university of Rhode Island, URI, alleged that URI created antitrust tie-ins of the "lock-in" type. Buying a *first* semester of URI tuition locked students into buying their *subsequent* semesters of university tuition from URI. URI had a *lawful* monopoly in the locked-in market, but URI, allegedly, *illegally* used its power in this market by conditioning its sale of subsequent semesters of URI tuition (the locked-in / tying products) on students *also* buying tied products: A) URI clinic health coverage, and, B) (for 40% of students) health insurance from the Life Insurance Company of North America, LINA. Students faced a cruel dilemma - either pay the mandatory clinic fees and insurance premiums, or, be expelled from URI. Students timely demanded trial by jury and sought antitrust treble damages. LINA, in a URI-distributed advertisement to all full-time URI students, fraudulently misrepresented the existence of a LINA policy. LINA conditioned its (fraudulent) coverage for any medical treatment outside URI (including psychiatric, contraceptive, and substance abuse counselling) on a student having first sought but not obtained treatment at URI. Both the clinic's coverage and LINA insurance included some coverage exclusively useable by women (pap smears, pregnancy testing, maternity coverage, etc.). URI and LINA intentionally billed males for this solely female coverage so as to obtain the males' money for nothing.

1. Does the First Circuit's conclusion, of no Fourteenth Amendment Equal Protection violation, conflict with the "irrational object of disfavor" standard in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), is the First Circuit's conclusion inconsistent with law in the Third, Ninth, and Eleventh Circuits, should the Court hold that a malevolent or benign motivation of a defendant is never needed for a violation of the Equal Protection Clause, and, does a State's preventing or impeding purchase of gender-

tailored health risk coverage violate said Clause ?

2. Given that *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992) requires a highly fact-specific inquiry to determine whether an alleged antitrust "lock-in" is present, has the First Circuit, in a complex antitrust case, so far departed from the accepted and usual course of judicial proceedings as to warrant the Supreme Court's supervision, where, in analyzing a F.R.Civ.P. 12(b)(6) motion, the First Circuit: a) disregarded many of the appellants' allegations, b) premised its affirmance at least in part on its own "factual" assumptions (which were incorrect *and* inconsistent with appellants' allegations), c) disregarded some of the appellants' arguments, d) noted but did not respond to one of appellants' arguments, and, e) attributed a specious argument to appellants that they never made ?

3. Has the First Circuit misconceived *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992), such that it mistakenly regards as a virtual prerequisite for an antitrust tying arrangement "lock-in", that the initial purchase must be an unamortized investment in an expensive complex durable good with little resale value, or other product with similar attributes ?

4. Do the First Circuit's erroneous assumptions of fact and its disregard of many of the students' allegations, obstruct a Seventh Amendment right to have the facts decided by a jury, given students timely demanded trial by jury and sought antitrust treble damages ?

5. Does the Constitution contain a liberty / privacy right to contract with a doctor of one's own choice, free from State interference (absent a compelling State interest), did the First

Circuit's rejection of said right conflict intolerably with Supreme Court precedent, and, if the Court has not already recognized said right should it do so, and, was said right violated where the State's interference consisted of facts stated below in the petition *plus*: **A)** a State university mandates pre-paid clinic fees (which fees absorb students' health dollars, thereby causing them to pay twice if they consult a non-university / non-State doctor), **B)** the university's clinic coverage has serious defects and a content and quality that students largely do not know and cannot know because of the university's secrecy, **C)** the university clinic incorrectly advertises it provides "top quality health care", **D)** the clinic is located in a building which the university has previously admitted "limits the quality of care" to students and was "inadequate", "perhaps dangerous", and, "filled with [fire] violations", **E)** the students' personal medical records are stored in said building, **F)** the university's selected student health insurer fraudulently advertised in university-distributed materials that said insurer drafted a policy for the students yet no policy had been drafted, **G)** the university never informs students of said fraud though aware of it, **H)** said insurer refuses to reimburse students for any medical treatment obtained outside the university clinic (including for psychiatric, contraceptive, and substance abuse counselling) unless the student first seeks but does not obtain treatment at the university, **I)** the university requires students confronted by medical emergencies later to inform the university's clinic of actions taken, and, **J)** students' personal medical records are under the custody of the clinic's administration, which was implicated in all of A)-I) above ?

LIST OF PARTIES

The caption of this petition identifies all parties in the United States Court of Appeals for the First Circuit, other than the past and present presidents of URI, namely, Mr. Eddy and Mr. Carothers, both of whom are only parties to a State law claim of gender discrimination. URI students Eve Arnold and David West had a motion to intervene granted in the District Court, were listed as parties in the appeal, and presumably are therefore properly petitioners in this petition. A class certification determination was stayed by stipulation of the parties pending resolution of the defendants' F.R.Civ.P. 12(b)(6) motion. Thus, the issue of class certification has never been reached. Nonetheless, if the Court decides the questions presented, the legal rights of tens of thousands of URI students, past present and future, would effectively be decided. (Decisions as to most of the questions presented would affect not only URI students, but the Nation - as described below in this petition.) Rhode Island's Board of Governors for Higher Education is not mentioned below in this petition as all of its misconduct appears to have been nonfeasance; it failed to do anything to prevent URI from committing URI's alleged illegalities.

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As to question presented # 1: the First Circuit's conclusion, of no Fourteenth Amendment Equal Protection violation, conflicts with the "irrational object of disfavor" standard in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), the First Circuit's conclusion is inconsistent with law in the Third, Ninth, and Eleventh Circuits, the Court should hold that a malevolent or benign motivation of a defendant is never needed for a violation of the Equal Protection Clause, and, for a State to prevent or impede purchase of gender-tailored health risk coverage violates said Clause. -- pages 7-11

As to question presented # 2: the First Circuit made grave F.R.Civ.P. 12(b)(6) methodological mistakes and other serious analytical errors that warrant the Supreme Court's supervision. As to question presented # 3: the First Circuit fundamentally misinterpreted the nature of an antitrust "lock-in" in *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992). -- pages 11-26

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The Opinion of the court of appeals is reported at 23 F.3d 14 (1st Cir. 1994). It is in the appendix, under separate cover, at App. 1A-16A. The Memorandum and Order of the district court is reported at 829 F.Supp. 529 (D.R.I. 1993). It is at App. 17B-40B.

SUPREME COURT JURISDICTION

A corrected judgment was entered in the First Circuit on May 4 1994. An Order of the First Circuit denying a timely petition for rehearing with a suggestion for rehearing en banc, was entered on June 16 1994. Jurisdiction in the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

Quoted in pertinent part in the appendix are: U.S. Const. amend. VII, U.S. Const. amend. IX, U.S. Const. amend. XIV, R.I. Const. Art. VI §§ 1 and 2, 15 U.S.C. § 1, R.I. Dept. of Business Regulation's Reg. 23 Part XI - Filing of Forms and Rates, §§ 1, 2, and 3, and, a host of States' laws potentially affected by the Equal Protection issues.

STATEMENT OF THE CASE

Statement of the facts (in addition to facts stated in the questions presented section), and, in some of the footnotes, corrections of some of the First Circuit's many errors of fact

URI, Rhode Island's only State university, mandated (and still mandates) that all full-time students pay a university health service (UHS) clinic fee (except graduate students with

HMO or full military benefits coverage[1]). Each semester about 10,000 students paid the mandatory UHS fee. URI also had a mandatory health insurance requirement which also applied to all full-time students (and still does). Students were required to buy university-billed health insurance or buy so-called "comparable" insurance by a deadline date. URI threatened to expel students from URI if they did not pay the UHS fee, the university-billed insurance premiums, and, URI's tuition charges.

The waiver option for "comparable" insurance was a charade because URI defined "comparable" out of existence. R.I. Blue Cross and all HMOs[2] were explicitly excluded - most of the competition. "[C]omparable" insurance was defined as covering all services[3] *performed at UHS, which is unlicensed by the State of Rhode Island*;[4] however, insurers do not cover treatment at unlicensed facilities, presumably due to the risks associated with such facilities. The "option" was part of an illegal ultimatum, as State law proscribes *in toto*: URI's mandatory health insurance requirement, URI's mandatory UHS fee, and, URI's sanction of expulsion for

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[1] Appellate Opinion at App. 3A n.1 incorrectly states "Graduate students are not required to pay the UHS clinic fee, provided they have health insurance coverage that meets URI's requirements." In fact, all graduate students with their own health insurance, of any kind, must pay the UHS fee. The only exemptions to the UHS fee are stated above.

[2] not just R.I. HMOs were excluded, which the First Circuit mistakenly indicates. App. 4A.

[3] including services from which UHS derived extra fees, i.e. in addition to the mandatory UHS fee.

[4] The First Circuit's Opinion is incorrect in failing to note "comparable" coverage must cover all services performed at UHS.

non-payment of the mandated charges.[5] And, the "option" expired on a URI-set date and so unequivocally did not exist after that date. To summarize re. the supposed non-LINA "option": 1) option not legally cognizable under federal law as illegal under State law, 2) option defined out of existence by URI (nothing "comparable"), and, 3) not even a bogus option remained after the so-called "waiver" deadline expired.

40% of students, after not submitting a so-called "waiver card" by URI's deadline date, no longer had even a charade of an option not to pay the URI/LINA health insurance premium, and they paid it. For this 40%, *after* expiration of URI's illegally set deadline,[6] URI *therefore unequivocally* conditioned sale of URI tuition on purchase of URI/LINA insurance; for this 40% it was mandatory. To avoid an outcry among the other 60% of students, who successfully resisted URI's pressure and bought non-LINA insurance, URI shrewdly did not try to enforce its impossible requirements for "comparable" insurance. Ironically, the insurance that these 60% of students bought was not "comparable" to LINA insurance, it was *incomparably* better; it *existed* but LINA's did not. LINA had fraudulently advertised the existence of a LINA policy to all URI students. *After* suit was filed, LINA admitted the policy did not exist at

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[5] URI asserts the R.I. legislature delegated legislative powers to URI that authorize URI to impose: the UHS and LINA charges, and, the sanction of expulsion for non-payment. URI could not quote *any* statutory language to satisfy the R.I. Const. Art. VI §§ 1 and 2's non-delegation principle; R.I.'s statutes simply have no such language. "*As long as* the Legislature demonstrates standards or principles to confine and guide the agency's power, this court will ... sustain the delegation." (Italics added.) *Bourque v. Dettore*, 589 A.2d 815, 817-818 (R.I. 1991). Rhode Island's courts have not addressed URI's assertion of delegated legislative power.

[6] the deadline, being part of URI's mandatory insurance requirement proscribed by State law, was therefore also illegal.

the time of its advertisement.[7] Several months after its advertisement, LINA drafted a policy which it submitted to the State's Department of Business Regulation (DBR). Rhode Island insurance regulatory law requires all health insurance policies to be of a DBR-approved form *prior* to sale.[8] Not only was the policy submitted to DBR months after the sale, and thus illegally late, DBR ruled that the policy failed to meet the law's "minimum standards"[9] and so disapproved it.

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[7] The First Circuit refers to LINA's fake insurance as though it were real insurance. Appellate Opinion at App. 3A. Given the non-existence of a policy, there was, as a matter of law, no insurance. "[T]he fundamental principle of insurance [is] that the insurance policy defines the scope of risk assumed by the insurer from the insured." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 131 (1982). LINA protests it paid out on "claims" - a misnomer as there was no policy. True, LINA paid out *some* monies, but to what extent and on what basis are unknown. Discovery was minimal and stayed by the District Court. Documents obtained in discovery suggest LINA's pay-outs were illegally late in most instances. Whatever LINA paid out was not insurance coverage, and helped to conceal the non-existence of a LINA policy. LINA invented the contract terms *during* the coverage period, and paid out as it pleased. "**[I]n antitrust cases, where the 'proof is largely in the hands of the alleged conspirators,'** *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 7 L.Ed. 2d 458, 82 S.Ct. 486 (1962), **dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.**" (Emphases added.) *Hospital Bld. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). URI may have conspired in LINA's fraud as a quid pro quo. LINA conditioned *all* coverage outside URI on students first going to URI. E.g. in FY 1991 UHS collected $459,992 from its extra revenue-raising services - those *not* covered by the mandatory UHS fee.

[8] R.I. Department of Business Regulation's Regulation 23 Part XI - Filing of Forms and Rates, §§ 1 and 2, App. 45D-46D.

[9] under DBR's Regulation 23 which aims to protect consumers against deceptive insurance practices. Reg. 23 is described in *Formisano v. Blue Cross of Rhode Island*, 478 A.2d 167, 170 (R.I. 1984), App. 44D-45D. Reg. 23 is itself 93 pages long.

LINA, however, illegally continued to use it.[10] Over eight months after sale, LINA amended the form of the policy such that DBR was able to approve its form. LINA never informed DBR (nor students) of LINA's illegal sale of a non-existent policy, nor, of LINA's illegal continued use of a DBR-disapproved policy form.

Buying non-LINA insurance necessarily entailed wasting money on URI's duplicative mandatory UHS fee, which covered primary health care, which was also covered by non-LINA insurance (but not by LINA). Since at least 1977 URI has known its UHS fee was "forcing them [i.e students with their own insurance] to pay double coverage for health care."[11]. Rather than compete with URI for the students' health risk coverage business, LINA conspired with URI to split the coverage. UHS covered primary care and LINA non-primary care (e.g. accident coverage). This tactical split enabled LINA to cost less than other insurance, as other insurance included both primary and non-primary coverage.[12]

URI, like many universities, has been selling a "package" each semester that contains numerous academic courses and two different forms of health risk coverage: university clinic coverage (which is like HMO coverage in that the coverage is in the form of treatment, not money),

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[10] violating DBR's Regulation 23 Part XI - Filing of Forms and Rates, § 3, App. 46D.

[11] 1976-77 UHS Report.

[12] The First Circuit makes the dovetailing appear to be a feat LINA accomplished for the student's benefit, rather than the ingenious anti-competitive tactic it is. Appellate Opinion at App. 3A. Further, non-LINA insurers could not offer dovetailed coverage as UHS keeps secret the specifics of its coverage. Non-LINA insurers had every right but no chance to compete for the students' primary care coverage business.

and (at least purportedly) health insurance coverage.

> "[B]ecause Kodak was a summary judgment case, rather than a Rule 12(b)(6) case, appellants argue that they did enough to withstand URI's motion to dismiss simply by alleging the existence of unspecified 'information' and 'switching' costs, which must be credited for Rule 12(b)(6) purposes." Appellate Opinion at App. 9A-10A.

First, appellants made no such argument, and second, they alleged[13] *numerous* specifics as to "information" and "switching" costs and considerations, most of which allegations the First Circuit disregards.[14] These very detailed allegations are stated in the argument section below.

Both the UHS coverage and LINA's fake insurance contained an exclusively female health risk coverage component (e.g. for pap smears, pregnancy testing, maternity

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[13] in their appellate brief, which was at their first opportunity, having had no opportunity in the District Court, because *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992), laying emphasis on information and switching considerations, was delivered *after* the amended complaint was filed, and the District Court dismissed the antitrust claims with prejudice. The First Circuit must surely have overlooked these facts (though they were briefed), as, by citing to *University of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1219 n.20 (1st Cir. 1993), which refers to the "due diligence" required in amending a complaint, the First Circuit implies plaintiffs failed to exercise due diligence - that they should have amended their amended complaint to allege "switching costs". App. 13A. To expect an amendment to said pleading before Senior District Court Judge Pettine ruled and in anticipation of however he might interpret *Kodak*, would be an unfair and unprecedented standard.

[14] whether intentionally or by oversight - which disjunct applies throughout this petition wherever the First Circuit is asserted to have disregarded a fact or argument.

coverage, etc.). URI, Mr. Morrissey (the Director of UHS), and LINA, used facially gender-neutral billing, i.e., males and females were billed the same amount. URI and LINA intentionally billed in this way "because of"[15] and not "in spite of"[16] the *foreseen and desired outcome*, i.e., the windfall they would obtain from males paying them for solely female coverage - something for nothing. URI and LINA were *aiming* for the males' money in return for nothing, as they *wanted* it in return for nothing. They obtained the males' money not merely with an "awareness"[17] that it was a windfall. They *wanted* the "adverse effects"[18] to *males*.

Jurisdiction in the court of first instance

Jurisdiction in the United States District Court for the District of Rhode Island was grounded in: 28 U.S.C. §§ 1331, 1337(a), 1343(a), and 1367(a).

ARGUMENT / REASONS FOR GRANTING THE WRIT

As to question presented # 1: the First Circuit's conclusion, of no Fourteenth Amendment Equal Protection violation, conflicts with the "irrational object of disfavor" standard in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), the First Circuit's conclusion is inconsistent with law in the Third, Ninth, and Eleventh Circuits, the Court should hold that a malevolent or benign motivation of a defendant is never needed for a violation of the Equal Protection Clause, and, for a State to prevent or impede purchase of gender-

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[15] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

[16] Id.

[17] Id.

[18] Id.

tailored health risk coverage violates said Clause.

Bray, which the First Circuit overlooked, construed 42 U.S.C. § 1985(3)'s "equal protection" content. En route to its § 1985(3) holding, the Court implied that a defendant, in order to have violated the *Fourteenth Amendment's* Equal Protection Clause, must, inter alia, have been motivated by an underlying "malevolent *or* benign" feeling towards the plaintiff-class *because it is that class.*[19] However, the Court also implied that, in certain circumstances, said motivation need not be alleged in order to state a valid Fourteenth Amendment Equal Protection claim.

> "Some activities may be *such an irrational object of disfavor* that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can be readily presumed. A tax on yarmulkes is a tax on Jews."[20] (Italics added.) *Bray*, 113 S.Ct. at 760.

The petitioners have *not* alleged that URI and LINA were motivated by either malevolent or benign feelings towards the plaintiff-class of male URI students. URI and LINA *are* alleged to have intentionally billed males for solely *female coverage* so as to obtain the males' money for nothing. Jews have every right to wear yarmulkes. Males have every right to use health risk coverage exclusively tailored to males - this activity clearly is "such an irrational object of disfavor"

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[19] Based on a *combined* reading of *Bray*, 113 S.Ct *at* 759, *at* 760 "[t]he **same** principle applies ..." (emphasis added), and, *at* 761 n.4 first full ¶ in right column.

[20] Taxation is a State activity, so, by saying "[a] tax on yarmulkes is a tax on Jews", the Court is speaking to the Fourteenth Amendment's Equal Protection Clause.

that males need not allege a malevolent or benign motivation in order to state a valid Equal Protection claim.

Besides, the Court should abandon both the requirement of a "malevolent or benign" motivation,[21] and, its "irrational object of disfavor" exception[22]. Stare decisis would not be offended, as *Bray* was not a Fourteenth Amendment case. For the "discriminatory purpose"[23] element of a Fourteenth Amendment Equal Protection violation the Court should only require an intent behind the defendant's act "at least in part" to achieve objectively "adverse effects" to the plaintiff-class as a class.[24]

URI and LINA intended their actions to cause objectively adverse effects to the class of male students as a class. URI and LINA wanted males to pay them something

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[21] **The Court's "malevolent or benign" motivation requirement is deeply misguided, because a class can be as much (or more) hurt by a defendant who felt indifferent towards it, as by a defendant who was motivated by a malevolent or benign feeling towards it.**

[22] Justice Stevens' criticism of the "irrational object of disfavor" language in *Bray*, 113 S.Ct. at 788, holds true in the Constitutional context. However, the Court should not abandon this exception if the Court retains the "malevolent or benign" motivation requirement, as the exception gives at least some victims (including the petitioners) a valid Equal Protection claim against "merely" indifferent defendants.

[23] *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Id. for the "at least in part" and "adverse effects" quotes, below.

[24] This, essentially, is Justice Stevens' reading of *Feeney*, 442 U.S. at 279, in *Bray*. Unlike Justice Stevens, Justice Scalia in *Bray* interpreted *Feeney*'s "at least in part" and "because of" clauses to refer *only* to a motivation *antecedent* to the above-described targeting intent, and *not* to said intent. To Stevens, J., said intent satisfies *Feeney*'s "discriminatory purpose" requirement (*Bray*, 113 S.Ct. at 787), but, to Scalia, J., said "purpose" requires said intent *plus* an antecedent malevolent or benign motivation.

for nothing. They *intentionally* billed the same amount to males and females so as to achieve that desired outcome. The outcome was not a coincidence - not a mere *statistically* disparate effect upon males as opposed to females.[25] Rather, *all* males *necessarily* were exploited by being billed for solely female coverage,[26] and, *necessarily*, *no* females were exploited.[27] This is a 100% certain impact on 100% of the males and on 0% of the females - an *absolute* impact more extreme (in that sense) even than the Equal Protection

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[25] unlike *Washington v. Davis*, 426 U.S. 229 (1976) and *Feeney*, where Equal Protection was not violated. Re. *Davis* and *Feeney*, relief may one day come to the class. Negroes may receive a better education and more pass a police test - *Davis*. More females may become veterans and enjoy a veterans' hiring advantage - *Feeney*. Yet, *no* male will *ever* be a female - the present case. The presently alleged Equal Protection violation stems from the *defendants'* act *itself* (sly billing), unlike in *Davis* and *Feeney*, where the claims were really based on *past* discrimination by *non*-parties.

[26] Central to the holding of no Equal Protection violation in *Gedulig v. Aiello*, 417 U.S. 484, 496 (1974) was that the actuarial value of the insurance was equal for men and women. Notably, URI's males obtain *less* for their health risk coverage dollar than females obtain for theirs.

[27] Females did not make a like Equal Protection complaint - that they were paying for coverage for exclusively male health risks (e.g. prostrate cancer). In the students' age-group, female health risk coverage costs more than male health risk coverage, and defendants knew that. Unisex policies cost more than male policies and less than female policies. Quite possibly URI males were subsidizing URI females, and if so, the URI females had no Equal Protection injury. Much insurance legitimately groups consumers, but only those who share the same risks in kind, if not degree. Males and females have health risks unique to their genders - differences in *kinds* of risk. For a State to prevent or impede a person from buying health risk coverage that excludes coverage solely useable by the opposite sex, surely violates the Equal Protection Clause. **If that is true, mandatory *unisex* health risk coverage at State universities (App. 47D) is unconstitutional, so are State laws that impede persons in the above-stated manner (App. 48D-50D), and, interpretation of States' equal protection clauses is affected (App. 50D-52D).**

violation in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)[28]. *Flores v. Pierce*, 617 F.2d 1386, 1389 (9th Cir. 1980) cited *Yick Wo* for the idea that certain adverse effects dictate discriminatory "intent" was present. The "or" in "intent or motive" in *Flores*, 617 F.2d at 1389, shows the Ninth Circuit does not require an underlying discriminatory "motive"; discriminatory "intent" suffices. The sufficiency of "intent", and, the necessary inference of "intent" from certain adverse effects, are reflected in *Ammons v. Dade City, Fla.*, 783 F.2d 982, 988 (11th Cir. 1986), and in *Comm. of Pa. v. Flaherty*, 983 F.2d 1267, 1273 (3rd Cir. 1993). In contrast, the First Circuit required students to allege a discriminatory *motive* - that is the only possible rationale within its Opinion for rejecting the students' Equal Protection claim.

As to question presented # 2: the First Circuit made grave F.R.Civ.P. 12(b)(6) methodological mistakes and other serious analytical errors that warrant the Supreme Court's supervision. As to question presented # 3: the First Circuit fundamentally misinterpreted the nature of an antitrust "lock-in" in *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992).

Introduction to facts and law re. questions # 2 and # 3

In this petition, as in *Kodak*, "package-pricing" means judging, with a solid basis, prior to any initial purchase, the *overall value* of a multi-part package bought over time, composed of: an initial purchase that later leads to a second purchase or purchases, that still later lead/s to a third purchase or purchases. By a "locked-in" product is meant a second stage purchase. The locked-in product is also the

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[28] All Chinese laundries in San Francisco were almost (but not absolutely) certain to be forced out of business by a facially-neutral ordinance which reserved in the enacting body arbitrary powers of discretion. No Caucasian laundry was hurt by the ordinance.

"tying" product that results in purchase of the third product/s, which is/are the "tied" product/s. To package-price requires that the consumer, *prior* to any initial purchase, at least have a solid basis for predicting, with respect to *every* part of the package (including the tying and tied parts which may be bought years after the initial purchase): its price, content, quality, and existence. If a consumer *is* able to judge whether the package is good or bad (i.e. package-price), if the package *is* bad, the consumer can avoid the package, by not buying the initial purchase, assuming freedom of choice not to buy it. URI's packages stretched over four or more years[29] and consisted of: a first semester of URI tuition (the initial purchase), seven or more subsequent semesters of URI tuition (the locked-in / tying products), at least eight semesters of UHS fees (all but the first being a set of tied products), and, at least eight semesters of URI-billed insurance premiums (all but the first being another set of tied products).

URI has little market power in the initial purchase market but monopoly power in the tying product market.[30] The First Circuit contends that URI students were not really locked-in to buying the tying products (subsequent semesters of URI tuition), that therefore URI's market power is correctly measured in the initial purchase market (not in the tying product market) and thus that students fail to allege the "appreciable economic power" (AEP) required for an illegal tying arrangement. Yet a lock-in *did* exist, as shown below. Thus, URI's power in the tying product market is *not* correctly considered to be only as significant as URI's small power in the initial purchase market, but rather *is* properly measured by URI's monopoly power in the locked-in/tying

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[29] For instance, undergraduate degrees typically last four years and doctoral degrees longer.

[30] Each semester the vast majority of URI students return to URI to continue their education rather than transfer to a competing university.

market, of subsequent semesters of tuition for URI students.

The First Circuit asserts the students lack the sort of "information" and "switching" allegations that the ISOs used to defeat Kodak's motion for summary judgment; *Kodak*, 112 S.Ct. 2072. However, the First Circuit grotesquely mishandled the students' allegations. Students *did* allege "information" facts sufficient to show the impossibility of package-pricing URI's package. Students *did* allege "switching" facts sufficient to show the impracticability (or for some students the impossibility) of switching to another university after enrolling at URI. These highly detailed "information" and "switching" facts are stated and analyzed below. The First Circuit disregarded all of them, which flouts F.R.Civ.P. 12(b)(6) law[31] and is highly unjust.

Information facts

Nobody can predict four or more years into the future the price,[32] content, quality, or even existence of the various

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[31] **"When deciding a motion to dismiss, the court must accept the allegations of the complaint as true.** *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980) (per curiam). **The court must also examine the alleged facts in the light most favorable to the plaintiff, and the complaint may only be dismissed if 'it appears beyond doubt that the plaintiff can prove no set of facts which would entitle [him] to relief.'** *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)." (Emphases added.) *Fisichelli v. City Known as Town of Methuen*, 653 F.Supp. 1494, 1497 (D. Mass. 1987).

[32] Tuition fees constitute *most* of the cost of university packages. Future URI tuition costs were (and are) uncertain because they depend in large part on the State's economy (which in turn largely depends on the regional, national, and world economies), and on how much money the State appropriates for higher education, and how much of that goes to URI. During the 1990-91 year students were billed an unexpected "one-time student fee of $90" - letter of then URI President Eddy to the students, citing the State's "fiscal crisis". Further analysis concerning price unpredictability appears below, as does analysis of the unpredictability of

parts of URI's package: UHS coverage, URI-selected health insurance, and, URI tuition. Not even URI can make such predictions, which is why URI's student catalogs state that all of URI's prices are subject to change "without notice"[33].

The First Circuit argues that students have not alleged unavailability of past prices of UHS fees, and, that using such data, students could have predicted future UHS price increases. In their motion for a rehearing, students did allege that URI made no effort to publicize past price data (regarding *any* of its charges), and, that for thousands of applicants to obtain it would be impossible as it is only on file in URI's archives, applicants do not even know of that source, and, even if they did, the logistics of thousands of applicants queuing up to obtain it would make it effectively unobtainable. Further, even armed with all the UHS fee data the First Circuit refers to, the alleged predictability of UHS price increases is implicitly based on unstated assumptions of fact[34], i.e. regarding the very complex and *not understood*

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the content, quality, and existence, of the various parts of URI's package.

[33] The First Circuit attributes a specious argument to appellants that they never made, i.e., that the unpredictability of UHS fees and LINA premiums is because "URI and LINA reserve the right to increase these charges each year". Appellate Opinion at App. 11A. This is incorrect in several ways. First, URI warns that it can change fees "without notice", not merely "each year". Second, LINA reserved no such right and made no such warning. The First Circuit is confused and incorrect in believing LINA was URI's student insurer during 1987-1993 as LINA allegedly was the insurer only in 1990-1992. (Appellate Opinion at App. 12A n.10). Third, URI's "without notice" caveat *reflects* the uncertainties in the world that affect the price, content, quality, and existence, of the various parts of the URI package. URI's caveat is not the cause of these uncertainties nor do students allege it is.

[34] Raw price data in itself supports no logical inference, so if the First Circuit is not implicitly assuming more facts, it is making a fallacious inductive inference - that future price increases will be similar to past price increases.

causes of price increases for health care and health risk coverage - causes which lawyers, doctors, hospitals, insurers, drug companies, politicians, and others with vested interests, attribute to each other. The First Circuit provides no reason to support its assertion that the UHS price increases were predictable. It merely lists the increases[35] and in effect says "see", but seeing backwards with hindsight is not the test. The UHS fee issue is whether a four year (or longer) solid predication of UHS fees was feasible (based on what was knowable without prohibitive cost[36]) to a URI applicant *prior* to his/her *first* semester. The increases were not predictable because their causes are *still* not understood. Also, any serious *attempt* to make a solid prediction would have required professional advice, which would have cost far more than the UHS fee increases themselves.[37]

Discovery was minimal, and contested until stayed by the District Court, and students *still* know too little about the content of UHS coverage,[38] and the quality of medical service at UHS, to make an informed comparison with any other university's clinic coverage and service, even assuming such data exists elsewhere - another implicit (and likely incorrect) factual assumption of the First Circuit. URI *still* refuses to release UHS reports for the last ten years, which would shed light on its coverage and quality of service, given that the

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[35] App. 12A n.10.

[36] *Kodak*, 112 S.Ct. at 2085-2087.

[37] UHS fees (for all full-time students except graduates with HMO or military benefits coverage): 1987-88 $179, 1988-89 $188, 1989-90 $200.50, 1990-91 $227.00, 1991-92 $248, 1992-93 $312.00.

[38] URI only divulged in approximate terms the content of UHS coverage *after* a discovery struggle, and, treatments requiring a specialist were merely "subject to availability of specialist" - a "not on the menu today" approach to delivering health services that shows the value of UHS coverage was uncertain or at least unknowable to students.

1977 UHS report admitted UHS facilities were "perhaps dangerous" to students,[39] and the 1972 UHS report admitted UHS was filled with fire violations[40]. UHS covered primary care, but UHS was closed during all URI holidays - about one third of the calendar year (including URI holidays during semesters, e.g. spring break). URI-billed insurance did not cover primary care. This caused a gaping hole in primary care coverage during URI holidays for all students who paid the URI-billed health insurance. URI and LINA *never* disclosed this gaping hole. Thus, the 4,000 LINA-paying students did not know, prior to enrollment at URI, that URI would be exposing them to *no primary care coverage during all URI holidays*.[41] Without such foreknowledge, students could not possibly judge the value of the UHS + LINA "product". Students cannot fairly be required to have foreknown the gaping hole in coverage, because, a fair assumption was that URI's chosen insurer would cover primary care whenever UHS was closed, especially as URI made UHS fees and insurance mandatory.

Regarding the URI-billed health insurance, nobody can know four years in advance whether URI will even require students to have health insurance. As recently as "in 1988-1989 health insurance was voluntary for all students"[42]. Further, nobody can foreknow the content of coverage that

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[39] "Health services is functioning in physical facilities which are inadequate; perhaps dangerous and most certainly anxiety provoking for staff and clients. Such a situation limits the quality of care we are able to give our student enrollment." 1977-78 UHS Report.

[40] "The State Fire Marshall has found the present building filled with violations." 1972-73 UHS Report.

[41] and they would only have found out later the hard way, i.e. by needing primary care during a URI holiday, and either paying for it themselves or foregoing it.

[42] URI's answer to plaintiffs' interrogatory 13.

will be offered by private health insurers to university students, still less its quality or price. LINA's letter to the students' counsel[43] indicates that universities typically refuse "off-the-shelf" policies thereby leaving insurers unable to write a policy "until shortly before the academic year". However, the unpredictability of LINA "insurance" was even greater, as LINA fraudulently misrepresented the very existence of its own insurance policy - the advertised "policy" had not even been drafted at the time of sale. URI even knew the "policy" was not on file at UHS and that LINA had advertised it was at UHS. The only realistic chance to predict this sort of sophisticated insurance fraud and the violations of State insurance regulatory law, is to have witnessed these before, but students, when they first enroll, have not seen these before.

Yet even if LINA's policy had existed, comparative shopping for health insurance would have been impossible as many health insurance policies differ in innumerable ways that defy meaningful comparisons, like apples and oranges. Further, the cost of market research to discover the value of policies (to the limited extent some can be intelligently valued) would far exceed any savings realized thereby.[44] To judge the value of one's health risk coverage dollar, one needs: medical,[45] legal,[46] and statistical knowledge,[47] (or

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[43] at page 2 of exhibit C attached to the Complaint.

[44] Unlike for other complex products, such as cars or televisions, there exist no "Consumer Reports" (nor other publications) that evaluate university clinics or student group health insurance policies. **Few products in our society are more complex and less understood by consumers than health risk coverage.**

[45] Laymen do not know the body's many and complex ailments.

[46] To understand any given health insurance policy requires hours of close analytical reading, even assuming it is coherent and unambiguous. Technical language is used, and to know whether it is insurance industry

access to such expertise, which is very costly), knowledge of one's own personal medical risks,[48] plus, knowledge of the competence of the medical and administrative staff at the university clinic (or HMO), and, of the quality of their buildings and equipment. Of these listed items, university applicants only know, at most, their own medical risks.

As for academic programs, before students enroll, most do not *know* what their "major" will be, and thus *cannot* do comparative-shopping between universities. Also, there is no objective data on the educational quality of different universities' numerous academic courses. Specific courses often differ in standard from a university's overall reputation, which anyhow may be inaccurate. Further, Rhode Island has been in a fiscal crisis for over six years, the State's educational funding has decreased, and, the very existence of some of URI's academic courses has been threatened.[49]

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terminology or legal language requires knowledge of the law. Often the language is ambiguous, and university applicants (most of whom are high school students) cannot fairly be expected to know that insurance policy ambiguities are construed against the insurer - so students would be left unsure as to the meaning of an ambiguous policy.

[47] of the incidence of different sorts of health risks in the group of which one is a member, here, young adults.

[48] Also, a young, healthy, and not reckless adult (i.e. at low risk), with some savings, may care to insure *only* against catastrophic loss (which would wipe out those savings), an option URI denies its students. In other words, one's own personal finances can play a role in one's health risk coverage decisions.

[49] E.g. "Governor Sundlun surprised faculty at the University of Rhode Island's Graduate School commencement yesterday when he announced that a recent order to cut $ 1.3 million in academic programs will be softened." Providence Sunday Journal at § B p.1, May 22 1994. **Discovery was stayed, and students had no opportunity to seek facts from URI that would show the full extent of the uncertainty of URI's courses.**

The above "information" facts demonstrate the unpredictability of the price, quality, content, and *even existence*, of the many products of a URI package[50]. Thus students could not possibly package-price URI's package nor any comparable university's package. The First Circuit blundered hideously by disregarding *all* of the above "information" facts. Its conclusion that no lock-in exists also stems from its incorrect and implicit assumption that URI informs students they will be billed UHS fees and health insurance premiums for their *entire* (four year or longer) degree course.[51] URI's materials state prices only for the *first* academic year and do not comment at all about any charges that may or may not be billed beyond the first year.

Switching facts

The initial purchase is a first semester of URI tuition. Tuition cannot be resold, is non-transferable, and thus worse than a Kodak copier which at least has some resale value. The First Circuit overlooked the non-transferability of tuition.

The First Circuit's "switching" analysis disregards the problems of switching from URI to another university, and the reasons for not wanting to switch. To switch from URI, students would face numerous obstacles: academic,[52]

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[50] E.g., 24 products in a 4 year package; with two semesters per year, and three broad types of products per semester (tuition, UHS coverage, and health insurance) there are, therefore, 24 products (2 x 3 x 4 years = 24).

[51] Appellate Opinion at App. 12A-13A, 14A, and 15A.

[52] Whether any given URI credit can be transferred (in whole, in part, or at all) turns on specifics, e.g. compatibility with the other university's academic program, degree of specialization of the credit sought to be transferred, and the student's grade obtained on the URI credit/standards at the other university. Colleges set their own policies about accepting credits from other institutions. Courses in a major may not meet the requirements of the major at the receiving institution, which may want the

logistical,[53] financial,[54] and human[55]. Switching must be done between semesters (at a cost of at least $200) because of the significant increase in costs of switching during

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bulk or even *all* of the major taken there. Half a sequence (such as Chemistry 101 in one semester followed by Chemistry 102 the next semester) may not be accepted for credit. Students should take both halves before trying to transfer. Students appended to their appellate brief pages from "The College Handbook for Transfer Students" which explains in more detail the problems and shortcomings of transferring. There is a financial disincentive to accepting URI credits as any university that accepts a URI-earned credit has one less course to sell to the transferring student.

[53] Form-filling, letter-writing, travelling, interviewing, moving, obtaining new housing, etc.. In more detail: contacting the other university, reviewing its materials to determine whether it has courses the student wants and is otherwise attractive, discovering whether (and if so to what extent) it will accept URI academic credits, completing an admissions form, submitting SAT scores, obtaining letters of recommendation, obtaining an academic transcript from URI, paying the other university an admissions fee, travelling to the other university for an admissions interview and/or to see its campus, completing a housing form (or arranging non-campus housing), moving from URI to the other university, attending an orientation session at the other university, plus all of the mailing and telephone chores.

[54] The costs of transferring from URI to another university (apart from far higher tuition rates for the 56% of URI students who in 1991 were Rhode Islanders) include the cost of performing all the above-described tasks, including the opportunity cost - the time required to do these tasks would amount to at least ten hours - time that could have been spent working at $5 per hour. The *total* cost would be *at least* $200, and greater the further the other university is from URI, if the student looked at more than one university, and/or had to complete a financial aid form (FAF).

[55] Emotional reasons for remaining at URI, e.g. spouse/boyfriend/girlfriend also student at URI or living in R.I., and, non-romantic reasons, e.g. leaving behind friends and/or family, affinity for URI or R.I., etc..

semesters.[56] Switching is impossible for those not admitted elsewhere[57]. Switching also entails abandoning whatever attractions (such as cheap in-state tuition rates) made URI the student's first or only choice of university,[58] and, abandoning

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[56] The above analysis of switching costs (of at least $200) assumes students *can* transfer at a cost-minimizing time. Any transfer during a semester would waste: a semester of URI tuition (as uncompleted courses do not earn credits), some rent (if living off-campus), if living in URI housing a housing fee (contracted per academic year, not per semester) plus meal plan fee (undergraduates with URI housing are automatically billed for a minimum number of meals for the entire semester. The *least* an undergraduate with URI housing could pay for URI meals was, *per semester*: 1990-91 $801.50, 1991-92 $875, 1992-93 $919. Obviously a student cannot eat URI meals if s/he has transferred from URI.) Students would also waste by transferring during a semester: the student assessment fee, and other URI fees, including the clinic fee and URI-billed insurance premium. Students with LINA insurance could only transfer at the *end of an academic year*, because, LINA insurance was billed annually and its (supposed) coverage was contingent upon a student first seeking treatment at the URI clinic - which clearly was not feasible if s/he had transferred to another university. If such a student had transferred at any time during the academic year (e.g. after the first semester) s/he would have lost the remainder of his/her insurance coverage. Two-semester courses can also financially preclude transfer for the entire academic year.

[57] Compared with many other universities URI is only moderately difficult to enter as a candidate for a first degree. Source: Peterson's "Entrance Difficulty Index" showing there are at least 200 universities that are more difficult to enter than URI.

[58] E.g. satisfaction with URI's education product. URI students do find that subsequent semesters of URI education are appealing, as otherwise they would not return to URI in high numbers for subsequent semesters of URI education. Discovery was stayed and plaintiffs could not press for the numbers of students who return to URI, first asked for in interrogatories in February 1992. URI's campuses are also unique. "In part because of its unique location near the ocean and six miles from Narragansett Bay, the University has developed strong marine programs and has been designated one of the national Sea Grant colleges." 1990-91 URI Bulletin for undergraduates. URI also has the "165-acre Narragansett Bay Campus" and the "2,300-acre" "Alton Jones Campus" in western R.I.,

whatever advantages accrue as a result of being at URI.[59] The cost of URI's tuition is far greater than the cost of the UHS fee and LINA insurance,[60] and students attend URI for

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with its "woods, fields, streams, and ponds" "the site of environmental education, research, and conference facilities." Id. **URI's *unique* campuses contribute significantly to URI's academic courses (and in some cases, such as marine courses, indispensably).** In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958) leases of *unique* land tied preferential routing provisions; power was held to exist in the tying market. Students also have their own personal reasons for wanting to remain at URI / not wanting to transfer elsewhere, e.g. a wish to develop contacts in R.I. as planning to live and/or work in R.I. after graduation.

[59] E.g. students who have been at URI for at least one semester are far better situated to learn about the nature of URI's offered courses, URI's professors' approaches to their subjects, and, their styles and strengths and weaknesses, than to learn about such matters concerning another university's courses and professors. No one ever publishes such "inside" knowledge, yet it is invaluable to select "good" courses and to avoid "bad" ones. Some URI professors must surely have authored copyrighted student textbooks. "The requisite economic power is presumed when the tying product is ... copyrighted." *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962). But no URI course, whether based on copyright materials or not, is interchangeable with any other university's course, as all professors at all universities *necessarily* bring to their work something unique of themselves. **Given that *movies* - so often a formula product - were held *not* interchangeable in *Loew's Inc.*, different universities' courses should also be held not interchangeable. A student who switches from URI loses the uniqueness of URI's courses. "[U]niqueness" alone can even suffice to show the requisite tying market power, *Loew's Inc.*, 371 U.S. at 45 n.4.** To measure the uniqueness of URI's courses is of course impossible, but it is vast. (To help show the scale of URI: URI has over 700 faculty, and, its 1992-93 research expenditure was over $33m. These two facts are judicially noticeable, based on URI data, but they were not alleged below.)

[60] Summary of URI's prices

Prices for in-state undergraduate tuition: 1987-88 $1,670, 1988-89 $1,770, 1989-90 $1,876, 1990-91 $2,046, 1991-92 $2,618, 1992-93 $2,874. **Prices for out of state undergraduate tuition:** 1987-88 $5,477,

its educational products, not its health risk coverage products. Each semester the costs of switching (at least $200) exceeded URI's price increases in the tied products.

The First Circuit also blundered hideously by disregarding *all* of the above "switching" facts. Further, the First Circuit was muddled and incorrect in assuming that "the college credit value of the first semester is neither nontransferable nor without economic or educational value in the future even if the student does not remain at URI."[61] First, "college credit" is not even a purchase (nor therefore an initial purchase or tying product), so the assumed transferability of "college credit" is beside the point. Second, college credits do not attach to neat *semester blocks*, but only to *individual courses* in which a student attains a pass grade. To earn a credit requires hard work and money for books, unlike a Kodak copier, which needs no consumer-work or extra expense to make *it* transferable. Third, there is scant if any "economic value" to a URI student who "drops out" of higher education after the first (or a later) semester, as even URI graduates face a bleak employment market. Fourth, the "educational value in the future" of a first URI semester is minimal, as students in the first semester acquire few if any of the lasting intellectual skills higher education has to offer.

1988-89 $5,696, 1989-90 $5,982, 1990-91 $6,550, 1991-92 $7,970, 1992-93 $9,308. **Prices for in-state graduate tuition**: 1987-88 $1,750, 1988-89 $1,856, 1989-90 $1,968, 1990-91 $2,146, 1991-92 $2,746, 1992-93 $3,014. **Prices for out of state graduate tuition**: 1987-88 $3,932, 1988-89 $4,168, 1989-90 $4,510, 1990-91 $4,938, 1991-92 $5,952, 1992-93 $6,952. **Prices for insurance premiums billed to URI students (both graduate and undergraduate in-state and out of state)**: 1987-88 $158, 1988-89 $182 (Aetna), 1989-90 $226 (Aetna) 1990-91 $282 (LINA), 1991-92 $330 (LINA), 1992-93 $369 (All American). **UHS fees (for all full-time students except graduates with HMO or military benefits coverage)**: 1987-88 $179, 1988-89 $188, 1989-90 $200.50, 1990-91 $227.00, 1991-92 $248, 1992-93 $312.00.

[61] Appellate Opinion at App. 13A.

The First Circuit misunderstands the nature of a "lock-in"

The First Circuit refers to the "initial, unamortized investment in a Kodak copier", notes it is an expensive and complex durable good with little resale value,[62] and attaches great significance to these attributes, as though a consumer virtually cannot show a lock-in without such an initial purchase. But *Kodak* simply does not indicate any particular *sort* of pressure or pressures that must exist in order for there to be a lock-in. Thus, lock-ins may be caused by *any sort/s* of pressure/s (provided sufficiently large), whether generated by the initial purchase or otherwise, and whether the pressure/s arise/s before, after, or simultaneously with (or from) the initial purchase. The *manner* in which consumers are locked-in is only of secondary (if any) antitrust significance to their *being* locked-in. First and foremost the antitrust significance of a "lock-in" is that it *empowers* the seller to *force* the locked-in consumers into tying arrangements. Assuming the consumer cannot switch, the only way *not* to be "locked-in" is if: a) the consumer foreknew (or should have foreknown) enough about the package to avoid buying the initial purchase, *and*, b) was free to choose not to buy the initial purchase. Only if both a) and b) are true can the consumer be held to have chosen his/her situation and thereby be unentitled to a "lock-in" type of tying claim. (Of course if switching were practical no lock-in would exist even if a) and b) were false). The First Circuit implicitly and mistakenly equates foreknowledge of a package with freedom of choice not to buy it. The First Circuit overlooks that even absent a monopoly or AEP in the initial purchase market, and even if consumers have foreknowledge of the package, there may exist a minority of vulnerable consumers who are under tremendous pressure to buy the initial purchase, even though most consumers in the initial

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[62] Appellate Opinion at App. 13A.

purchase market are immune to that pressure.[63] Thus, even if one shares the First Circuit's incorrect assumption that university applicants could have package-priced URI's package, one cannot thereby conclude that *the applicants who enrolled at URI* could have avoided URI. In fact, they could not rationally have avoided URI, for two main reasons: URI's in-state tuition rates were far cheaper than tuition rates they could obtain elsewhere,[64] (for the 56% of them who were Rhode Islanders), and/or URI having the best academic reputation of any university to which *they* were admitted. Obviously with respect to the students who did enroll at URI, URI was compellingly attractive, as URI won their business ahead of *all* the competition. Even if *these* students had foreknown all about URI's package, including URI's fraudulent, undefined, and otherwise inferior health risk coverage products, *they* would still have enrolled at URI, as the cost of these products is trivial compared to the savings on cheap tuition fees (and other benefits) they would obtain by attending URI.[65] And the same is true at any university;

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[63] "Had previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy, Kodak's 'market power', i.e. its leverage to induce customers to purchase Kodak servicing, could **only have been as significant** as its AEP in the copier market ..." (Emphases added) Appellate Opinion at App. 14A. In the initial purchase market Kodak could have had great leverage over some consumers, even though little leverage over the vast majority of consumers. The significance of leverage over a relatively few vulnerable consumers is of antitrust concern as these *are* locked-in, and so, with respect to *them*, the seller's market power should be measured in the locked-in market, not in the initial purchase market.

[64] at any comparable university. URI is Rhode Island's only State university. Detailed tuition price data for over 1,500 universities was cited in the appellants' brief and filed in the District Court.

[65] At App. 10A the First Circuit in effect acknowledged that appellants had noted the cross-inelasticity of demand between the initial purchase market and the tied product markets, but the First Circuit then totally failed to respond to this important argument. "The extent to which one market

students attend the best[66] university to which they have been admitted, regardless of its health risk coverage products.[67]

Summary & Conclusion re. questions presented # 2 & # 3

To package-price URI's package was impossible. To switch from URI was grossly impractical (and for some students impossible) for financial and other reasons. Thus, students *were* locked-in to buying subsequent semesters of tuition from URI, and therefore URI *did* have AEP in the tying product market. The First Circuit reached its conclusion, of no lock-in (no AEP, and thus no valid antitrust claim), by disregarding numerous alleged facts that show students *were* locked-in, and, by making major and incorrect assumptions of fact. Such terrible gutting of the alleged facts in deciding a 12(b)(6) motion flouts the Court's law,[68] and warrants its supervision. The First Circuit's analytical errors listed in question presented # 2, and discussed above, also warrant the Court's supervision.

The First Circuit's requirements for a "lock-in" radically misconceive *Kodak*. Now sellers can fearlessly create and exploit consumer-bases that do not fit the First Circuit's "lock-in" criteria. URI is still doing so.

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prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the 'cross-elasticity of demand.'" (Citations omitted.) *Kodak*, 112 S.Ct. at 2083.

[66] "best" in their view, affordability of tuition being one major factor, and academic standing another.

[67] Obviously URI was not compellingly attractive to most university applicants as most were not Rhode Islanders (and therefore ineligible for URI's in-state tuition rates). Also, thousands who went elsewhere did so as these other universities have better academic reputations than URI's.

[68] The Court's 12(b)(6) case law is quoted above on p.13 n.31.

As to question presented # 4: the First Circuit obstructed the students' right to trial by jury.

The First Circuit's above-described erroneous assumptions of fact, and, massive disregard of students' allegations of fact, obstruct a Seventh Amendment right to have the facts decided by a jury, given students timely demanded trial by jury and sought antitrust treble damages.[69]

As to question presented # 5: the Constitution contains a liberty / privacy right to contract with a doctor of one's own choice, free from State interference (absent a compelling State interest). The First Circuit's rejection of said right conflicts intolerably with Supreme Court precedent. If the Court has not already recognized said right, it should do so. Said right was violated if the alleged facts are true.

The Constitution contains liberty to contract[70] and privacy[71] rights.[72] One may need and/or want to

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[69] "[T]he right to trial by jury applies to treble damages suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade, ..." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959).

[70] "[L]iberty ... denotes not merely freedom from bodily restraint but also the right of the individual to contract, ..." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[71] emanating from the Fourteenth Amendment's "liberty", and rights implicit in the Ninth Amendment - *Griswold v. Connecticut*, 381 U.S. 479 (1965) or "implicit in the concept of ordered liberty" *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). E.g. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraceptives), *Roe v. Wade*, 410 U.S. 111 (1973) (right to abort a pregnancy) - all matters of the utmost privacy. The Constitution's privacy right covers "the individual interest in avoiding disclosure of personal matters [and] the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Students disclosed personal medical matters to URI/State medical

contract/consult with a doctor of one's *own* choice. Privacy and trust are crucial for effective psychiatric, contraceptive, and substance abuse counselling. LINA conditioned coverage for *any* treatment obtained outside URI, on a student having first sought it at URI. This barbaric condition violated the students' privacy rights. If students consult non-State doctors of their *own* choice, they must pay a *second* time for their health care, even assuming they can afford to do so. So, the mandatory UHS and LINA charges financially penalize students for exercising their liberty / privacy rights, and thus violate those rights. The First Circuit asserts that the alleged liberty to contract/privacy right lacks case law authority,[73] yet

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personnel, and this private information was stored at UHS, which URI previously admitted was filled with fire violations. The records were under the custody of the UHS administration, which was implicated in all the misconduct listed in question presented # 5.

[72] Judge Pettine misconceived the liberty to contract claim as an economic issue, overlooking its privacy aspects. App. 38B-39B. He assumed that State law authorized the UHS and LINA charges, and that students were making a substantive constitutional challenge to State economic legislation. Yet no such challenge was made; plaintiffs had clearly alleged that the UHS fee and URI's mandatory health insurance requirement both *violate* State law. Counsel did not move for reconsideration (the First Circuit implies he should have done - App. 15A n.11) as he considered no procedural rule supported it. Further, even moving for reconsideration would have seriously risked *losing* plaintiffs' right to appeal. The dismissal of plaintiffs' case was not partial, and so a "reconsideration" motion could easily have been treated as a F.R.Civ.P. 60(b) motion, (*Aportria v. Maine Turnpike Authority*, 672 F.Supp. 536, 537 (D.Me. 1987), rather than a F.R.Civ.P. 59(e) motion merely to alter or amend), and, thus *failed* to have stayed the time to appeal. Counsel would have been gambling on *not* running out of time to appeal - a poor gamble given the case's factual and legal complexity. Rules of procedure are unfair if like a casino. The *new* F.R.A.P. 4(a)(4)(F) (which took effect *after* students' chance to move for reconsideration ended) is a vast improvement; it *stays* the appellate clock until determination of a F.R.Civ.P. 60(b) motion (if filed within 10 days of entry of judgment).

[73] App. 14A-15A.

the Court surely has decided that said right exists.[74] If the Court has *not* so decided, it should, such is that right's profound significance to a free people.[75] The State's interference (noted in question presented # 5 and elsewhere in the petition) is: coercive, dishonest, intrusive, medically unacceptable, hypocritical, and wastes students' money.

The First Circuit implies URI did not "deprive" students of the claimed "liberty", as students (supposedly) had "full knowledge"[76] of the mandatory UHS and LINA charges, and paid anyhow. This consent argument disregards the lock-in, LINA's fraud, and, URI's non-disclosure of that fraud *and* of the defects of UHS coverage. Thus, URI *did* "deprive" students of "liberty" to contract, as no student gave *informed* consent to pay for the bogus products.[77] Further, threatening expulsion from URI was extremely coercive, as

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[74] For instance, regulations "insisting upon recitation of a lengthy and inflexible list of information" designed to influence the woman's informed choice between abortion and childbirth were unconstitutional "'obstacles in the path of the doctor upon whom [the woman] is entitled to rely for advice in connection with her decision.'" (Citation omitted.) *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 445 (1983). "[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child-rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room or as otherwise required to safeguard the right to intimacy involved." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973).

[75] "In a constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." (Citations omitted.) *Board of Regents v. Roth*, 408 U.S. 564, 572 (1971). A right to choose one's own physician, free from State interference, surely falls within any civilized "broad" concept of liberty.

[76] Appellate Opinion at App. 15A.

[77] Some URI students had no objection to paying for the UHS and LINA products, but only because they were deceived about said products.

a university education is of major significance to an individual's life and work. An attempt to transfer merely to avoid the UHS and LINA charges would have been highly irrational, and, would probably have failed, as other universities would regard such a student as a troublemaker.

Conclusion regarding all questions presented

The First Circuit's "lock-in" criteria misconceive *Kodak* and subvert tying law. *Kodak* requires the lower courts to scrutinize complex "information" and "switching" facts. Yet, even in a 12(b)(6) context, the First Circuit disregarded vital "information" and "switching" allegations, assumed incorrect facts, and, mishandled students' arguments. The First Circuit obstructed students' Seventh Amendment right to have a jury decide the facts. The sooner the Court makes the liberty / privacy right explicit, the better, for the People, and, most urgently, for hundreds of thousands of State university students who pay mandatory health services fees (App. 47D). Unfettered and informed choice for all health care consumers is now pivotal to reduce costs and improve quality, as Congress, in the foreseeable future, is most unlikely to pass a comprehensive health care reform Bill. The First Circuit overlooked the males' Equal Protection claim under *Bray*, and, Equal Protection law in other Circuits. The other Equal Protection Clause issues concern its worth and meaning, and are of permanent import to academe, insurers, the States, and the Nation.

Therefore, the petition should be granted.

Respectfully submitted,

Sinclair T. Banks
Keven A. McKenna

September 12, 1994 Attorneys for Petitioners

(2)

Supreme Court, U.S.
FILED

No. 93-
94 468 SEP 14 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

TONY LEE, RAMACHANDRAN PALISSERY, RALPH TALARICO, EVE ARNOLD, AND, DAVID WEST, for themselves and all those similarly situated,

Petitioners,

v.

THE LIFE INSURANCE COMPANY OF NORTH AMERICA, THE UNIVERSITY OF RHODE ISLAND, MR. BLAISE MORRISSEY, AND, THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS BOARD OF GOVERNORS FOR HIGHER EDUCATION, individually, jointly and severally, in their corporate, official, and personal capacities,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SINCLAIR T. BANKS, Counsel of Record, 79B Frank Avenue, West Kingston, R.I. 02892, Tel. (401) 783-6155. KEVEN A. McKENNA, 23 Acorn Street, Providence, R.I. 02903. *Attorneys for Petitioners.*

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APPENDIX § A

United States Court of Appeals
For the First Circuit

No. 93-1988

TONY LEE, ET AL.,

Plaintiffs, Appellants,

v.

THE LIFE INSURANCE COMPANY OF NORTH AMERICA, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Raymond J. Pettine, Senior U.S. District Judge]

Before

Torruella, Circuit Judge,

Aldrich, Senior Circuit Judge,

and Cyr, Circuit Judge.

Sinclair T. Banks, with whom Keven A. McKenna was

on brief for appellants.

Jay S. Goodman, with whom William P. Devereaux and McGovern, Noel & Benik, Inc. were on brief for University of Rhode Island, et al.

Phillip A. Proger, with whom Jones, Day, Reavis & Pogue were on brief for University of Rhode Island, et al., as to antitrust issues.

May 4, 1994

CYR, Circuit Judge. Three University of Rhode Island ("URI") students appeal from a district court order dismissing their federal antitrust, equal protection, and due process claims against URI, its Board of Governors, three URI officials, and URI's student-health insurer, Life Insurance Company of North America ("LINA"). Finding no error, we affirm the district court judgment.

I

BACKGROUND

As a precondition to reregistering each semester, URI requires all full-time undergraduate students to pay a fixed fee for the right to use URI's on-campus, walk-in medical clinic, University Health Services ("UHS").[1] All students who pay the UHS clinic fee must also carry supplemental health insurance coverage for certain medical services, such as x-rays, lab tests and gynecological tests, that are available through UHS. Two supplemental insurance options are available. First, the student may obtain supplemental insurance through LINA, a private health care underwriter which URI sponsors as its "default" insurer. LINA purportedly "dovetails" its supplemental coverage so that the insured student pays an annual premium that minimizes duplicative coverage; that is, it lessens the risk that the LINA premium and the UHS clinic fee will reflect redundant coverage for the same medical procedures.[2] As a second option, students may secure "comparable [supplemental]

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[1] Graduate students are not required to pay the UHS clinic fee, provided they have health insurance coverage that meets URI's requirements.

[2] LINA coverage requires the student to present for treatment at UHS in the first instance, pending possible referral to an outside health care provider.

coverage" from an off-campus health care insurer of their choice, except that URI does not consider either Rhode Island Blue Cross or Rhode Island-based HMOs "comparable coverage." Students who do not opt out of the LINA "default" coverage by a specified deadline are automatically billed for the annual LINA premium, and cannot reregister for the following semester until the LINA premium has been paid. The automatic "default" scheme notwithstanding, only about 40% of the students who pay the UHS clinic fee insure through LINA.

Appellants initiated this class action in federal district court against URI and LINA in January 1992. The amended complaint alleges that the practice of conditioning continued matriculation at URI on payment of the UHS clinic fee and/or the LINA supplemental insurance premium violates the Sherman Antitrust Act, 15 U.S.C. § 1 (1993), as well as the equal protection and due process guarantees under the United States Constitution. Following minimal discovery, URI and LINA moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6),[3] and the district court dismissed all claims. Lee v. Life Ins. Co. of N.A., 829 F. Supp. 529 (D.R.I. 1993).[4]

II

DISCUSSION

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[3] Appellants' motion for class certification was stayed pending disposition of appellees' motions to dismiss.

[4] At the same time, the district court declined to exercise jurisdiction over several pendent state-law claims, see 28 U.S.C. § 1367(c)(3) (1993). Cf. infra note 11.

A. The Antitrust "Tying" Claim

Appellants challenge the dismissal of their claim that the URI health care-insurance scheme is an impermissible "tying" arrangement in violation of the Sherman Act, 15 U.S.C. § 1 (1993) ("Every contract . . . in restraint of trade or commerce . . . is hereby declared to be illegal."). See Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S.Ct. 2072 (1992) ("Kodak"). "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" Id. at 2079 (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958)). Generally speaking, an impermissible "tie-in" occurs if a seller (viz., URI) enjoys either a monopoly or "appreciable economic power" ("AEP") in the "tying" product (or service) market, and uses its considerable market leverage to "coerce" a buyer already intent on purchasing the tying product from the seller into buying a second, "tied" product that the buyer would not have bought based solely on the quality or price of the tied product itself. See Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969); see generally Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794-96 (1st Cir. 1988) (describing procompetitive policy interests animating per se tying analysis).[5] Since many product "ties" may not prove anticompetitive, notwithstanding their somewhat misleading epithet, "per se" tie-ins may require a "fairly subtle antitrust analysis" of "market power," a fact-intensive inquiry aimed at winnowing out only those ties most likely to threaten anticompetitive harm. Id. at 795.

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[5] The tie-in must also affect a substantial volume of commerce in the tied market, see Kodak, 112 S. Ct. at 2079, a factor not at issue in this case. Further, we assume, without deciding, that URI is a participant in the insurance "market," for antitrust purposes, simply because it receives a one-time $10 processing fee for each LINA policy sold to a URI student.

Appellants claim three "product" tie-ins: (1) between a university education (URI) and health insurance coverage (LINA); (2) between health care services (UHS) and health insurance coverage (LINA); and (3) between a university education (URI) and health care services (UHS).[6] We agree with the district court however, that appellants failed to allege any "tie-in" claim upon which relief could be granted. In particular, appellants failed to advance a colorable claim as to an indispensable element: that URI had AEP in the relevant tying markets (university education and health care services). AEP or "market power" is the demonstrated ability of a seller "to force a purchaser to do something that he would not do in a competitive market." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984); see also Grappone, 858 F.2d at 794. AEP may be demonstrated, for example, if the seller holds a monopoly in the tying product (e.a., a patented product), controls a very large share of sales in the tying product market, see id. at 796 (AEP "means significant market power" over an "'appreciable' number of buyers") (emphasis in original) (citation omitted), or produces a

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[6] Notwithstanding certain misgivings, we further assume, without deciding, that the amended complaint adequately pleads two other essential "tying" claim elements. These assumptions merely facilitate clearer focus on the core deficiency in appellants' antitrust claim. First, we presume that the products at issue are distinct, i.e., that each is distinguishable by consumers in the relevant market, and that there would be sufficient consumer demand for each individual product, and not merely as part of an integrated product "package." See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22 (1984). But see id. at 39 (O'Connor, J., concurring) (noting obvious policy limits of "two product" rule, since almost every product could be broken down into smaller constituent parts that might be sold separately); Lee, 829 F. Supp. at 537 ("I do not believe plaintiffs have adequately alleged that this arrangement involved two separate products."). Second, we accept, arguendo, the questionable contention that URI students are "coerced" financially into buying LINA coverage because only LINA insurance "dovetails" with UHS clinic fee services.

"unique" tying product, and therefore faces no significant competition from functionally similar products or services, see Jefferson Parish, 466 U.S. at 37-38 n.7 (O'Connor, ., concurring) (market must be defined to include "all reasonable substitutes for the product"); Grappone, 858 F.2d at 796 (market encompasses all "readily available substitutes").

Appellants can assert no colorable claim that URI holds AEP either in the "tying" market for a university education or in the "tying" market for health care services. URI competes for new undergraduate and graduate students on a regional and national level with dozens of universities and colleges.[7] Although URI obviously is a "unique" institution in a colloquial sense, appellants cannot claim that other institutions of higher education do not or cannot provide "functionally similar" educational offerings to potential URI applicants. Cf. id. at 798 (brand name alone does not establish product "uniqueness" necessary for AEP). And, of course, absent AEP in the university-education market it is a virtual given that URI cannot enjoy AEP in the student health care business.

Appellants attempt to circumvent URI's evident lack of AEP in the two relevant tying markets by contriving a so-called Kodak "lock-in." Kodak involved distinct products: Kodak copiers (the "lock-in" product), Kodak copier replacement parts (the tying product), and Kodak copier servicing and repair (the tied product). In 1985, Kodak began to confine sales of Kodak copier parts to Kodak copier owners who contracted to have their copiers serviced by Kodak, rather than by Kodak's servicing competitors ("ISOs"). Kodak, 112 S.Ct. at 2077-78. Significantly, only Kodak parts would fit Kodak copiers. Id. at 2077. The ISOs initiated an antitrust action against Kodak under section 1 of the Sherman

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[7] As of 1991, for example, Rhode Island residents comprised only 56% of the URI student body.

Act. After truncated discovery, the district court granted summary judgment for Kodak. Id. at 2078. The Ninth Circuit reversed, Kodak, 903 F.2d 612, 617 (9th Cir. 1990), and the Supreme Court affirmed, Kodak, 112 S. Ct. at 2092.

By reason of Kodak's very small market share in copier sales, the parties had stipulated that Kodak had no AEP in the copier market (assuming copier sales to be the relevant "tying" market), and hence, no unlawful "tie" could exist between Kodak copiers and Kodak parts-servicing. Id. at 2081 n.10. The Supreme Court accordingly focused on whether an unlawful tie-in nonetheless existed between Kodak parts and Kodak servicing. Id. Kodak argued for the view that, either presumptively or as a matter of law, vigorous competition in the copier market would prevent Kodak from raising its parts and servicing contract prices above competitive levels, because any such price increases in these derivative aftermarkets" would become known to copier-equipment consumers, and eventually cause Kodak to lose ground to its competitors in copier sales. Id. at 2081-82, 2083.

The Court rejected Kodak's per se "cross-elasticity of demand" theory, identifying two different fact patterns which, if borne out by the evidence, might support a reasonable inference that parts and servicing contract price increases would not necessarily cause Kodak to lose copier sales. Under the first scenario, the evidence might demonstrate that a substantial number of consumers, at the time of their original copier purchases, would not enjoy cost-efficient[8] access to the difficult-to-acquire pricing information needed to evaluate the total "life-cycle" cost of the entire Kodak

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[8] The Court noted that even assuming readily available price information, consumers rationally might decide not to investigate lifecycle costs if investigation would prove more costly than the potential savings. Id. at 2086.

"package" - namely, the price of the copier, likely replacement parts, and product-lifetime servicing. Id. at 2085-87. Under the second scenario, the Court postulated that, in a market for complex durable goods like copiers, current Kodak-copier owners might tolerate even uncompetitive price increases in Kodak parts and servicing as long as the increases did not exceed the costs of abandoning their original investment in the Kodak copier and switching, for example, to a Canon or Xerox copier. Id. at 2087-88. Since Kodak's servicing competitors had produced some evidence of "very high" switching costs for Kodak copier owners, the Court opined that such "lock-ins" attendant as they are to the original copier purchase could conceivably enable the plaintiff ISOs to establish Kodak's AEP in the derivative "tying" aftermarket for Kodak parts. The Court accordingly concluded that the undetermined "information costs" and "switching costs" represented material issues of fact, and if in genuine dispute, would preclude summary judgment, even though Kodak lacked AEP in the "lock-in" product market for copiers. Id. at 2086-87.

Appellants attempt to shoehorn their allegations into this Kodak "derivative aftermarket" mold, by proposing the following comparative model: first-semester matriculation at URI serves as the "lock-in" product, as did the Kodak copier; subsequent semesters at URI serve as the tying product, as did Kodak replacement parts; and health clinic services and health insurance coverage represent the tied products. Of course, URI, like Kodak, might contend, on summary judgment or at trial, that its lack of AEP in the locked-in product market ("sales" of first-semester university education) creates a "cross-elasticity of demand," which would prevent health clinic fees and LINA supplemental insurance premiums from being increased to uncompetitive levels. Nevertheless, because Kodak was a summary judgment case, rather than a Rule 12(b)(6) case, appellants argue that they did enough to withstand URI's motion to dismiss simply by alleging the existence of unspecified "information" and "switching" costs,

which must be credited for Rule 12(b)(6) purposes. See Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 997 (1st Cir. 1992) (review of Rule 12(b)(6) dismissal is de novo, crediting all allegations in the complaint and drawing all reasonable inferences favorable to plaintiff).

Appellants challenge the district court ruling that their "information cost" allegations were insufficient to defeat the motion to dismiss. First, appellants argue that URI cannot posit a "cross-elasticity of demand" in the present context because the prices charged for health clinic services and insurance premiums are too insignificant in relation to tuition and other university-education costs to be considered a meaningful factor in determining whether potential applicants for admission will attend URI or some other university. Alternatively, appellants argue that URI would bear the burden of proof on this issue at trial, and that on appeal it has not pointed to supportive evidence of consumer "sophistication".

Appellants exaggerate the role that summary-judgment burden shifting played in the Kodak analysis. Kodak simply pointed out that summary judgment was not yet in order on Kodak's "cross-elasticity of demand" theory (1) in light of the plaintiff ISOs' proffer on "information costs" i.e., readily inferable expenses associated with accumulating technical information relating to the costs of equipment, parts, and servicing over the lifetime of a "complex durable goods" item, and (2) in the absence of any conclusive evidence from Kodak that a substantial number of purchasers actually make accurate pre-purchase assessments of the lifecycle "package" price of their Kodak copiers. Thus, the Court neither discussed any reallocation of burdens of proof at trial, nor in any way intimated a shift in the evidentiary burden of proof on the factual issues of "information costs" and "lock-in." See, e.g., Jefferson Parish, 466 U.S. at 13-14 (assuming burden of proof rests with plaintiff to show AEP in tying-product market); Town Sound and Custom Tops, Inc. v.

Chrysler Motors Corp., 959 F.2d 468, 479 n.12 (3d Cir.) (plaintiff bears burden of proof on "tying market" definition), cert denied, 113 S. Ct. 196 (1992). In order to withstand URI's motion to dismiss for failure to state a claim, therefore, it was appellants' burden (absent any colorable claim that URI had AEP in the locked-in product markets for university education and student health services) to allege "information costs" which would prevent a substantial number of URI students from accurately assessing the total costs of a URI education, including health clinic fees and insurance premiums, in determining whether to matriculate at URI.

Second, appellants argue that it is impossible to allege "information costs" because potential URI applicants cannot know or predict their future URI health clinic fees and LINA insurance premiums with any precision, since URI and LINA reserve the right to increase these charges each year. But appellants mistake the focus of the Court's concerns about the "information costs" in Kodak.

In Kodak, the information required by the customer pertained to the lifecycle pricing of a Kodak copier "package," information so patently "difficult and costly" to come by that it spontaneously gave rise to a reasonable inference that unsophisticated consumers would not have the information needed to evaluate their options at the time they made their decision to purchase a Kodak copier. Kodak, 112 S. Ct. at 2085.[9] By contrast, before signing up for their first

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[9] The Kodak Court elaborated on the complexity of the "information" needed to make an informed investment:

"In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of

semester at URI, students are informed that their continued matriculation at URI is conditioned, inter alia, on their "purchase" of health clinic services at a stated annual fee, subject to historically predictable annual increases, and on their purchase of supplemental insurance coverage.[10] See Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1709.2, at 1174 (Supp. 1993) (Kodak does not focus on potential exploitation of the "irrational or foolish" purchaser, but the purchaser who makes the rational decision that comparative-shopping costs would outweigh any savings from a fully informed purchase; "the [Kodak] context was confined to hard-to-obtain information") (emphasis added); cf. id. at 1174 ("[R]elevant information need not be so comprehensive as a binding future price schedule"); see also supra note 8. Appellants have made no allegations sufficient to give rise to a reasonable inference that the healthcare and insurance-cost

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"downtime" and losses incurred from downtime.

Much of this information is difficult some of it is impossible to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a decreased need for repair, or new warranties. In addition, the information is likely to be customer specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of downtime." Kodak, 112 S.Ct. at 2085-86.

[10] Considering the recent hyperinflationary trends in the health care industry as a whole, UHS clinic fees have increased at fairly predictable increments since 1987: 1987-88 ($179); 1988-89 ($188); 1989-90 ($200.50); 1990-91 ($227); 1991-92 ($248); 1992-93 ($312). LINA premiums have increased comparably over the same period, from $158 in 1987-88 to $369 in 1992-93. The record contains no evidence that prospective URI applicants would have great difficulty gaining access to this information from any number of reliable sources (e.g., URI application materials, URI admissions officials, past or current URI students, college entrance source books). Nor do appellants suggest that URI had any incentive to conceal the scope of past price increases. On the billing invoices it mails to students, URI routinely individualizes its charges for registration, tuition, UHS fees, LINA premiums, and taxes.

information needed to make an informed decision whether to accept the preconditions to continued matriculation at URI is either difficult or expensive to obtain or correlate.

The district court further ruled that appellants failed to state an actionable claim that they were "locked in"; that is, they failed to plead actual costs associated with switching from URI after their first semester. Although appellants now assert that they can amend their complaint to allege such costs, we conclude that further amendment to allege specific "switching costs" would be futile. See University of Rhode Island v. A.W. Chesterton Co., 2 F.3d 1200, 1219 n. 20 (1993).

First, there is an important distinction between Kodak and the present case. Kodak was a "derivative aftermarket" case involving "complex durable goods." Unlike the copier parts in Kodak, subsequent URI semesters are not "derivative aftermarket" components upon which the buyer's initial investment absolutely depends. As the Supreme Court noted, Kodak copiers are "expensive when new," incompatible with replacement parts used in other copiers, and retain "little resale value" presumably because complex durable goods depreciate so rapidly. Kodak, 112 S.Ct. at 2077. The "lock-in" would occur provided it could be shown that Kodak copier owners must either purchase replacement parts from Kodak or abandon their initial, unamortized investment in their Kodak copier. In contrast, a completed first semester at university is discretely priced - students do not pay for their entire four-year stint in advance - and the "college credit" value of the first semester is neither nontransferable nor without economic or educational value in the future even if the student does not remain at URI. Thus, appellants' attempt to extend Kodak, beyond the "derivative aftermarket" context to the educational context, is problematic at best.

Second, the timing of the "lock-in" at issue in Kodak was central to the Supreme Court's decision. Unsophisticated

Kodak copier owners were destined for "lock-in" from the moment they purchased their Kodak copiers. At the time current Kodak copier owners bought their copiers, Kodak had not yet conditioned its sale of replacement parts on the purchase of Kodak servicing, and its later-announced policy to that effect was made applicable both to prospective and existing Kodak copier owners. Had previous customers known, at the time they bought their Kodak copiers, that Kodak would implement its restrictive parts-servicing policy, Kodak's "market power," i.e., its leverage to induce customers to purchase Kodak servicing, could only have been as significant as its AEP in the copier market, which was stipulated to be inconsequential or nonexistent. See Kodak, 112 S.Ct. at 2095-96 (Scalia, J., dissenting) (noting that even the Kodak majority probably would have found no "lock-in" had Kodak announced its parts-service "tie" at the time of its market entry); see generally Philip E. Areeda, supra, ¶ 1709.2, at 1164-68 (same). In the instant case, however, students know before their matriculation that they are buying a URI "package" that includes at least two "tied" products a URI education and on-campus health care services and insurance. As appellants failed to assert a colorable claim that URI had AEP in the primary (university education) market, no Kodak-type "lock-in" could have occurred in subsequent semesters, and even the most detailed allegations of "switching costs" would be wholly unavailing.

B. The "Due Process" and "Equal Protection" Claims

Appellants attempt to raise two vaguely articulated constitutional challenges to the URI health services-insurance scheme. First, they argue that URI's conditioning of continued matriculation on the payment of a health clinic fee violates their constitutional right to procedural due process, by depriving them of a property interest (fees and premiums), and a liberty-privacy interest (the alleged right to retain a physician of one's choice). Unsurprisingly, appellants cite no case authority for either contention, nor have we found

any.[11] Appellants purchased a "product" - "service" from URI with full knowledge from the outset that health care fees and supplemental insurance premiums were a required component of the cost. We perceive no procedural infirmity.

Second, appellants argue that the URI "package" infringes their constitutional right to equal protection of the laws because male and female students matriculating at URI must pay the same health care fees, even though male students will not utilize the UHS gynecological services. The district court aptly found that appellants failed to allege that URI imposed this unitary scheme with any discriminatory animus aimed at male students. See Nieves v. University of Puerto Rico, 7 F.3d 270, 276 (1993) (plaintiff contesting classification-neutral statutes on equal protection grounds must

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[11] The district court interpreted appellants' complaint as alleging claims based on substantive due process and the right to contract. Appellants concede that their "cumbersome briefing" contributed to this understanding, yet did not move for reconsideration. See Vanhaaren v. State Farm Mut. Auto. Ins. Co., 989 F.2d 1, 45 (1st Cir. 1993) (issues raised for the first time on appeal are deemed waived). Unfortunately, the procedural due process claim asserted on appeal is no less unwieldy.

Inexplicably, appellants continue to urge that Rhode Island law disempowered URI from entering the "business" of health care and insurance, and that the LINA policies were merely a fraud or sham affording students no actual coverage. Although these allegations might be material to appellants' ultra vires claim under state law, which the district court dismissed without prejudice, cf. Boston Envtl. Sanitation Inspectors Ass'n v. City of Boston, 794 F.2d 12, 13 (1st Cir. 1986) (noting that state actor's "[m]ere violation of state statutory requirements does not offend federal constitutional due process"), or conceivably may have served as a basis for some sort of consumer protection claim, appellants do not explain how URI's mere refusal to continue selling them a service (i.e., education) would constitute an actionable "deprivation" of their "property rights" for federal due process purposes. Cf. id. (noting that "an alleged breach of contract [by a state actor] does not amount to a deprivation of property without due process"); Jimenez v. Almodovar, 650 F.2d 363, 370 (1st Cir. 1981) (same).

proffer not only evidence of disparate effect, but evidence that enactment resulted "because of," rather than "in spite of," classification) (citing Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 278-80 (1979)); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988). Appellants advance no curative allegations for relieving this infirmity.

Affirmed.

APPENDIX § B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

TONY LEE,
RAMACHANDRAN PALISSERY,
and, RALPH TALARICO,
for themselves and all
those similarly situated

Plaintiffs

v. C.A. No. 92-0058 P

THE LIFE INSURANCE
COMPANY OF NORTH
AMERICA, THE
UNIVERSITY OF RHODE
ISLAND, MR. EDWARD
EDDY, MR. ROBERT
CAROTHERS, MR. BLAISE
MORRISSEY, THE STATE
OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
BOARD OF GOVERNORS FOR
HIGHER EDUCATION,
AND, ONE OR MORE
JOHN DOES, individually,
jointly and severally, in
both their corporate
capacities, and, in
their personal and
official capacities

Defendants.

MEMORANDUM AND ORDER

PETTINE, RAYMOND J., Senior U.S. District Judge

This is a class action lawsuit on behalf of current and former students at the University of Rhode Island ("URI" or "the university").[1] Plaintiffs allege a multitude of federal and state claims attacking the university's mandatory health clinic fee and health insurance requirement. Jurisdiction is premised on 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1337(a) (antitrust); 28 U.S.C. § 1343(a) (civil rights); and 28 U.S.C. § 1367(a) (supplemental).

Defendants have moved to dismiss this suit under Fed.R.Civ.P. 12(b)(6) for failure to state a claim. For the reasons stated below, I grant defendants' motion with respect to all federal claims. In addition, I decline to exercise supplemental jurisdiction over the pendant state claims, and dismiss those claims without prejudice.

I. Standard of Review

It is not proper to dismiss a complaint under Fed.R.Civ.P 12(b)(6) unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley v. Gibson, 335 U.S. 41, 45-46 (1957)). In making this determination, a court should accept the well-pleaded complaint as true and indulge every reasonable inference in favor of the plaintiff. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). This standard of review "does not mean, however, that a court must (or should) accept every allegation made by

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[1] No plaintiff class is currently certified. All parties have agreed to a stay of plaintiffs' motion for class certification pending resolution of defendants' motion to dismiss.

the complainant, no matter how conclusory or generalized." U.S. v. Avx Corp., 962 F.2d 108, 115 (1st Cir. 1992).

II. Background

URI operates a University Health Services ("UHS" or "health clinic") on its Kingston, Rhode Island campus. UHS offers ambulatory services and health education to URI undergraduate and graduate students by walk-in or by appointment. It is open 24 hours per day, seven days per week during the academic year.

URI imposes a mandatory health clinic fee for full-time undergraduate and graduate students. Full-time graduate students may only waive the health clinic fee if they are a member of a health maintenance organization, or a member or dependent of the military. Undergraduate students may only waive the fee if they enroll in fewer than 12 hours per semester. In 1991-92, the health clinic fee was $124.00 per semester.

URI also requires full-time students to carry health insurance to supplement the medical coverage provided through UHS. Students may satisfy this requirement in two ways. They may (1) purchase a private health insurance policy offered through URI or (2) demonstrate that they have "comparable coverage" through some other health insurance plan. In 1990-91 and 1991-92, the URI-sponsored policy was available through defendant The Life Insurance Company of North American ("LINA"). The cost of the LINA policy (12 month coverage) was $282.00 for 1990-91 and $330.00 for 1991-92.

The LINA plan was designed to "dovetail" with medical services provided at UHS. Thus, a student enrolled in the LINA plan would only pay for coverage of health services not provided through the student's mandatory health clinic fee. Additionally, under the LINA plan, insurance

coverage was only available if students first sought medical assistance from UHS. If necessary, a student was then referred to an outside health care provider by UHS. If UHS was closed (e.g., during official university holidays and the summer), students were required to notify UHS of any medical actions taken.

Students opting for "comparable" plans in 1990-91 and 1991-92 were required to submit a waiver card to the university by a date certain. Failure to submit the waiver card resulted in automatic enrollment in, and billing for, the LINA plan. If the LINA bill was not paid, URI prohibited future registration of that student. URI warned its students in writing that comparable coverage plans must pay for laboratory tests, x-rays, orthopedic supplies and selected gynecological procedures performed at UHS. URI also cautioned its students that Rhode Island Blue Cross and health maintenance organizations in Rhode Island were not deemed "comparable" plans.

In 1990-91 and 1991-92, approximately 40% of the more than 10,000 URI students acquired health insurance through LINA. The remaining 60% obtained coverage from other carriers. While the university claims that it makes no profit on the insurance requirement, it does collect a $10.00 administrative fee for processing each student. In addition, UHS is supported, in part, by the laboratory, x-ray, orthopedics and gynecological fees that are paid by student insurance carriers.

On January 31, 1992, plaintiffs filed the present action. Unfortunately, there is no simple way to summarize plaintiffs' legal theories. They have adopted an everything-but-the-kitchen-sink approach to this case. Plaintiffs' amended complaint is a 45 page single-spaced document crammed full of federal and state claims. On the federal side, there are numerous antitrust allegations, as well as claims under the Equal Protection and Due Process clauses of the Fourteenth

Amendment to the United States Constitution. On the state side, plaintiffs' claims include Money Had and Received, Breach of Contract, Duress, Negligent Misrepresentation, Innocent Misrepresentation, Breach of Insurer's Duty to Deal Fairly and in Good Faith, Negligence, Breach of Implied Contract, Breach of Fiduciary Duty and Ultra Vires. Plaintiffs also assert equal protection and due process claims under the Rhode Island Constitution, and claims under Rhode Island antitrust statutes.[2] At its core, this suit seeks to recoup health clinic fees and LINA insurance premiums paid by plaintiff URI students, plus treble damages for antitrust violations.

III. Discussion

A. Federal Antitrust Claims

I begin my scrutiny of the amended complaint with the federal antitrust allegations (Counts VII, XVI). Plaintiffs advance three antitrust claims: (1) conspiracy claims under 1 of the Act; (2) per se tying claims under §1 of the Sherman Act; and (3) conspiracy to monopolize claims under §2 of the Sherman Act. Defendants' primary argument in support of their motion to dismiss is that plaintiffs have failed to adequately allege the essential elements of any antitrust

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[2] Plaintiffs' sweeping litigation strategy is not confined to their complaint. Plaintiffs originally filed with this Court a two volume, 357 page single-spaced Memorandum In Support Of Their Objection To Defendants' 12(b)(6) Motion To Dismiss. This Court then directed plaintiffs to resubmit a memorandum of law not more than 60 double-spaced pages. Plaintiffs only superficially complied with the Court's instructions. While they did file a 60 page abbreviated memorandum, plaintiffs repeatedly cross-reference crucial material in the abbreviated memorandum to voluminous passages contained in the original 357 page brief. In the interests of judicial economy, this Court has overlooked plaintiffs' mishandling of this motion and considered arguments contained in both the original and abbreviated filings.

violations.[3]

1. Conspiracy Claims Under §1 of the Sherman Act

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. §1. Despite this sweeping language, the U.S. Supreme Court has long recognized that the Act prohibits only unreasonable restraints of trade. Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988).

To determine unreasonable restraint of trade, courts generally evaluate the alleged anticompetitive actions "through case-by-case application of the so-called rule of reason test that is, 'the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" Id. (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)). In the First Circuit's words, "[t]he 'rule of reason' limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications..." Clamp-All Corp. v. Cast Iron Soil Pipe

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[3] Defendants also contend that they have antitrust immunity from suit based upon three separate grounds: (1) the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which provides an antitrust exemption for the "business of insurance"; (2) the so-called "state-action" doctrine, which offers immunity for actions taken by state government and certain private actors; and (3) the Local Government Antitrust Act, 15 U.S.C. §§ 34-36, which bars antitrust damage actions against local governments, including "special function governmental unit[s] established by State law in one or more States." Because I hold that plaintiffs have failed to state a valid claim under either §1 or §2 of the Sherman Act, there is no need to address these defenses.

Institute, 851 F.2d 478, 486 (1st Cir. 1988), cert. denied, 488 U.S. 1007 (1989). In this special context, the term "'anticompetitive'...refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. And, the law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods." Id. (citations omitted).

In limited circumstances, courts will apply a per se standard to antitrust allegations under §1. The per se approach is appropriate where the challenged conduct is "manifestly anticompetitive" and thus no in-depth analysis of the market effect is necessary. Business Electronics, 485 U.S. at 723-24. Examples of per se violations include price-fixing schemes and concerted refusals to deal. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9 and n. 10 (1984); U.S. Healthcare, Inc. v. Healthsource Inc., 986 F.2d 589, 593 (1st Cir. 1993).

Thus, to state a valid claim under §1 of the Sherman Act, a plaintiff must allege three elements: (1) the existence of a contract, combination or conspiracy: (2) that the agreement unreasonably restrained trade under the per se or rule of reason analysis; and (3) that the restraint affected interstate commerce. See Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1410 (9th Cir.), cert. denied, _ U.S. _, 112 S.Ct. 617 (1991). See also ABA Antitrust Section, Antitrust Law Developments 2 (3d ed. 1992).

In the present case, plaintiffs allege a litany of interconnected claims under §1 of the Sherman Act that relate to some type of conspiracy or exclusionary arrangement between URI and LINA:

> (1) URI and LINA conspired in imposing the mandatory clinic fee and insurance requirement.

Amended Complaint at ¶¶ 97, 112, 152, 255, 256.

(2) URI and LINA conspired in requiring students covered by LINA to first seek treatment at the URI clinic to obtain insurance coverage. Amended Complaint at ¶¶ 113, 114

(3) URI and LINA conspired to dictate alternative insurance coverage (i.e., non-LINA) in terms of the health clinic's revenue raising procedures. Amended Complaint at ¶ 127.

(4) URI and LINA conspired to automatically charge some students for the full annual amount of the LINA plan, even though LINA coverage did not actually begin until students paid their bill. Amended Complaint at ¶ 106.

(5) URI and LINA conspired to require "more of a non-LINA policy than is furnished by the LINA policy." Amended Complaint at ¶ 120.

(6) URI and LINA conspired in "carrying out URI's requirement that male students have health insurance that includes coverage for gynecological services..." Amended Complaint at ¶ 134.

(7) URI and LINA conspired in "the URI clinic fee's female coverage component for men ..." Amended Complaint at ¶ 138.

Plaintiffs appear to concede that these allegations should be viewed through the rule of reason lens. But they argue that the anticompetitive nature of the mandatory health

clinic fee and insurance requirement is "self-evident." Plaintiffs' Abbreviated Memorandum at 23. I believe that the rule of reason approach is proper in this case. Plaintiffs do not cite any cases to support a per se violation, and this Court's research has not unearthed any such precedent. Given this finding, plaintiffs' conspiracy claims must be dismissed.

Plaintiffs' amended complaint does not present sufficient facts to indicate how these challenged actions unreasonably restrained trade in any relevant market, or had significant adverse effects on competition. Only two facts in the amended complaint shed any light on anticompetitive effects. The first is that Rhode Island Blue Cross and health maintenance organizations in Rhode Island were not considered "comparable" insurance plans. The second is that the LINA plan was intentionally "dovetailed" with UHS to provide an insurance package less expensive than that available from other carriers.

These facts are not sufficient to show how the clinic fee or insurance mandate unreasonably restrained trade or harmed the competitive process. Plaintiffs have not pled any facts suggesting that URI or LINA coerced students into buying the LINA plan, or that they sought to unfairly exclude competitors from insuring URI students. Rather, URI allowed students to choose between LINA or "comparable" coverage plans. This policy, plaintiffs acknowledge, resulted in a majority of URI students opting for non-LINA policies. Amended Complaint at ¶ 144 ("Thousands of URI students have non LINA/URI health insurance"); Plaintiffs' Abbreviated Memorandum at 28 n.74, 32-33 (approximately 40% of URI students bought LINA insurance).

Moreover, simply because certain insurance plans were not deemed "comparable" is not enough evidence, standing alone, to suggest significant anticompetitive effects. See, e.g., Reazin v. Blue Cross and Blue Shield, 899 F.2d 951,

960 (10th Cir.), cert. denied, 497 U.S. 1005 (1990)(with rule of reason claim under §1 of the Sherman Act, "the adverse impact must be on competition, not on any individual competitor or on plaintiff's business") (emphasis in original): Les Shockley Racing Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989)("removal of one or a few competitors need not equate with injury to competition" under rule of reason §1 claim).

In short, plaintiffs have failed to adequately allege in their amended complaint how URI and LINA conspired to unreasonably restrain trade under §1 of the Sherman Act. There is no need for this Court to determine the existence of a contract, combination or conspiracy, or whether the challenged actions affected interstate commerce.

2. Tying Claims Under §1 of the Sherman Act

Plaintiffs' second cluster of antitrust claims are per se tying allegations under §1 of the Sherman Act. A tying arrangement is an agreement by one party to sell a product (the tying product) only on the condition that the buyer purchases a second product (the tied product), or at a minimum, that the buyer agrees that it will not purchase the second product from any other seller. Eastman Kodak Co. v. Image Technical Services, Inc., _ U.S. _, 112 S.Ct. 2072, 2079 (1992); Northern Pacific Railway Company v. United States, 356 U.S. 1, 56 (1958). The Supreme Court has long recognized that "certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'." Jefferson Parish, 466 U.S. at 9. The caselaw indicates that a per se tying violation occurs where: (1) there is a tie of two separate products; (2) the seller has "appreciable" or "sufficient" economic power in the tying product market; and (3) the tie affects a substantial volume of commerce in the tied product market. See Kodak, 112 S.Ct. at 2079; Jefferson, 466 U.S. at 16-22; Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-503

(1969). See also Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 794 (1st Cir. 1988).[4]

Plaintiffs allege three separate tying arrangements. The first arrangement is between a URI education (tying product) and URI's health clinic (tied product). Amended Complaint at ¶¶ 109, 253. The second is between URI's health clinic (tying product) and the LINA insurance (tied product). Amended Complaint at ¶ 149. The third is between a URI education (tying product) and the LINA insurance (tied product). Amended Complaint at ¶ 98.

With all due respect to plaintiffs' efforts in this area, I believe their amended complaint fails to state a viable tying claim. To begin, for two of the three alleged tying arrangements the health clinic and LINA insurance, and URI education and LINA insurance plaintiffs have simply not alleged sufficient facts to show that an actual tie existed. Plaintiffs do not indicate that URI conditioned a university education or health clinic services on the purchase of LINA insurance. As noted above, students were given a choice of subscribing to the LINA plan or choosing a "comparable"

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[4] In theory, it is also possible to prove that a tying arrangement violates §1 of the Sherman Act under the rule of reason. Under the rule of reason unlike the per se test a plaintiff bringing a tying claim "has the burden of proving that the [challenged action] violated the Sherman Act because it unreasonably restrained competition." Jefferson Parish, 466 U.S. at 29. The First Circuit has interpreted this requirement to mean that a plaintiff cannot show a tying violation in the absence of the per se rules unless the tie's anticompetitive effects outweigh its legitimate business justifications. Grappone, 858 F.2d at 799.

In the current action, plaintiffs do not articulate a rule of reason challenge. Nor do they allege sufficient facts in the amended complaint that point to significant anticompetitive effects in any tied product market. Thus, I conclude that plaintiffs have failed to state a rule of reason tying claim.

plan.[5]

With respect to the remaining alleged arrangement -- URI education and the mandatory health clinic fee -- most students were obliged to pay the health clinic fee. Nevertheless, I do not believe plaintiffs have adequately alleged that this arrangement involved two separate products. In Jefferson Parish, supra, the U.S. Supreme Court stated "that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." 466 U.S. at 19. Stated another way, a tying arrangement must "link two distinct markets" where there is "sufficient demand" for each product. Id. at 19-22. See also Kodak, 112 S.Ct. at 2080.

In the case at hand, plaintiffs have not legitimately alleged that the URI health clinic is part of product market separate from a URI education. They merely argue in their briefs that students go to URI for its academic offerings, not for mandatory clinic coverage. But this conclusory statement does not indicate the existence of a separate market for student clinic services available to URI students.

An additional fatal flaw in all three purported tying schemes is plaintiffs' failure to adequately allege significant economic power in a relevant tying market. "Market power is the power 'to force a purchaser to do something that he

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[5] Plaintiffs argue that the health insurance requirement precludes some students from employing "self-insurance." Abbreviated Memorandum at 24. If students do not wish to purchase any insurance, however, the university's mandate lacks anticompetitive consequences. "[W]hen a purchaser is 'forced' to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." Jefferson Parish, 466 U.S. at 16. See also Grappone, 858 F.2d at 799.

would not do in a competitive market."' Kodak, 112 S.Ct. at 2080 (quoting Jefferson Parish, 466 U.S at 14). "The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." Id. at 2081. Market power may also be shown where a seller offers a unique product that competitors cannot offer such as a patented product or a special tract of land. Jefferson Parish, 466 U.S. at 16-17; Grappone, 858 F.2d at 796.

Plaintiffs argue that there is sufficient proof of economic power in both of the relevant tying product markets. With respect to the URI education, plaintiffs declare that "URI easily enjoys 'a significant market share' of the higher education business of URI students." Plaintiffs' Abbreviated Memorandum at 20. Plaintiffs' market power arguments concerning URI's mandatory health clinic fee are inextricably linked to their URI education market assertions. They state: "Given URI's market power in URI students' education, and that clinic fee risk coverage is tied by it, URI also has market power in said risk coverage." Plaintiffs' Abbreviated Memorandum at 20.

Plaintiffs assert that this market definition is justified because the vast majority of students do not transfer to other schools once they enroll at URI. Several reasons for this low transfer rate, according to plaintiffs, are the trouble and expense for a URI student to transfer to another school, problems transferring URI academic credits to another university, a student's aversion to leaving family or friends, and the higher tuition and costs at other universities. Plaintiff's Original Memorandum at 160-61. In essence, plaintiffs assert that students become "locked-in" to a URI education once they enroll, even if the university does not possess significant economic power over prospective students

before they first matriculate.[6] Plaintiffs' Original Memorandum at 161-63. This "lock-in" provides URI with market power over the continued education of its students.

Last year, the U.S. Supreme Court provided support for this line of argument in Eastman Kodak, supra. In Kodak, independent service organizations brought an antitrust action under §1 and §2 of the Sherman Act challenging Eastman Kodak's policy of restricting the availability of spare parts for its photocopier and micrographic equipment to only those customers who serviced their own machines or hired Kodak service. 112 S.Ct. at 2076-77. The Ninth Circuit determined that Kodak was not entitled to summary judgment on the §1 tying claims because there was an issue of material fact whether Kodak's economic power in the tying product market (spare parts) restrained competition in the tied product market (service). The Court of Appeals also concluded that summary judgment was inappropriate on the §2 claims. Id. at 2078-79.

Kodak argued in the Supreme Court "that even if it concedes monopoly share of the relevant parts market, it cannot actually exercise the necessary market power for a Sherman Act violation ... because competition exists in the equipment market [i.e., Kodak and other equipment brands]." Id. at 2081 (emphasis in original). Kodak asked the Court to adopt a legal presumption that equipment competition precludes a finding of monopoly power In the service or parts "aftermarkets." Id. at 2082. The Court rejected this argument in affirming the Ninth Circuit's ruling. In

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[6] Plaintiffs do suggest in passing, however, that "[b]efore the prospective student enrolls at any university, URI has market power regarding that prospective student if s/he is not admitted anywhere else or cannot afford to go anywhere else, or, lacks a non-URI option for any other reason." Plaintiff's Original Memorandum at 161 (emphasis in original). Plaintiffs do not expand upon this highly speculative theory of market power, and thus I believe it merits no attention from the Court.

addressing the §1 tying claims, it held that there was a question of fact over: (1) whether there was sufficient information in the marketplace about the "lifecycle" costs of maintaining this type of equipment at the time of purchase; and (2) the costs of switching from Kodak to another product after purchasing the equipment that is, whether high switching costs will "lock-in" consumers to Kodak machines.[7] Id. at 2086-87.

Turning back to our case, I do not believe plaintiffs have alleged sufficient facts in their amended complaint to support a market restricted to the higher education business of solely URI students. For one thing, no facts are alleged that the health insurance requirement was a hidden cost. The university has apparently required health insurance since 1968. Thus, the premiums at issue in this case were required beginning in the first semester of a student's enrollment at URI. Presumably, students who did not want to buy health insurance had enough information at that stage to decide whether to matriculate at URI or choose another school. This easily discoverable information helps distinguish this case from the facts in Kodak, where there was a factual question concerning the availability of information about future repair costs when the Kodak equipment was originally purchased.

In addition, plaintiffs do not present any facts in the amended complaint that point to the inability of students to transfer to other schools. There are no facts on the costs of switching schools. There are no facts on transferring URI credits. Nor are there any facts on the comparative costs of public and private schools inside and outside of Rhode Island. Plaintiffs simply rely on conclusory statements in their

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[7] Also critical to the Supreme Court's denial of summary judgement on the §1 tying claims was evidence "that Kodak's control over the parts market has excluded service competition, boosted service prices and forced unwilling consumption of Kodak service." 112 S.Ct at 2081.

supporting memoranda to carry the day.

No further analysis of the tying claims is necessary. I need not determine whether plaintiffs have alleged facts sufficient to demonstrate that a substantial volume of commerce in the tied product market was affected.

3. Monopolization Claims Under §2 of the Sherman Act

Plaintiffs' final grouping of antitrust claims fall under §2 of the Sherman Act, which states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony..." 15 U.S.C. §2. "'The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.'" Kodak, 112 S.Ct. at 2089 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)). "Monopoly power is the power to control market prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). See also Kodak, 112 S.Ct. at 2090. In simple terms, the relevant market is composed of (1) the product market and (2) the geographic area involved. See du Pont 351 U.S. at 404; Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962). The relevant product market generally consists "of products that have reasonable interchangeability for the purposes for which they are produced," taking into consideration price, use and quality. du Pont, 351 U.S. at 404. This determination often involves an evaluation of the "cross-elasticity" of demand between products or "the degree that buyers of one product switch to the other in response to price changes." H.J. Inc. v. ITT, 867 F.2d 1531, 1538 (8th

Cir. 1989).

Plaintiffs' claims here can best be characterized as alleging a conspiracy to monopolize.[8] First, they allege that LINA and URI conspired to monopolize for the URI health clinic "the health care business" of URI students enrolled in the LINA plan. Amended Complaint at ¶ 128. Second, they allege that LINA and URI conspired to monopolize the "health risk coverage of those URI students whose health was not already insured elsewhere. Complaint at ¶¶ 155 and 254 (emphasis in original). In other words, URI and LINA targeted their marketing efforts at those students who were not already covered by an "automatic" source of insurance (e.g., a parent's or spouse's policy) and thus "had to go shopping in order to become insured." Plaintiffs' Abbreviated Memorandum at 30.

Courts have articulated three elements of a conspiracy to monopolize: (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize. See Seagood Trading Corp. v. Jerrico Inc., 924 F.2d 1555, 1576 (11th Cir. 1991);

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[8] Both plaintiffs and defendants have characterized these §2 claims as "attempted monopolization" rather than conspiracy to monopolize. In my view, conspiracy to monopolize is a better label because the claims allege a conspiracy between two entities URI and LINA. In any case, the choice of category is not critical to the outcome. As discussed below, plaintiffs have failed to allege a specific intent to monopolize in the relevant market an essential element for both attempted monopolization and conspiracy to monopolize. Compare Spectrum Sports. Inc. v. McQuillan, _ U.S. _, 113 S.Ct. 884, 890-892 (1993)(elements of attempted monopolization) with Seagood Trading Corp. v. Jerrico. Inc., 924 F.2d 1555, 1576 (11th Cir. 1991)(elements of conspiracy to monopolize) and Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2nd Cir. 1988)(same). Moreover, conspiracy to monopolize might be viewed as an easier claim to plead than attempted monopolization because the plaintiff need not address the element of a "dangerous probability of success" in the market. ABA, Antitrust Law Developments at 272.

Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2nd Cir. 1988); Dreiling v. Peugeot Motors of American Inc., 850 F.2d 1373, 1382 (10th Cir. 1988). See also ABA, Antitrust Law Developments at 270 (collecting cases). Assuming plaintiffs have properly alleged the existence of a combination or conspiracy and an overt act, the amended complaint does not allege sufficient facts to show a specific intent to monopolize for either of the §2 claims. More precisely, neither claim alleges a specific intent to monopolize a relevant market.

With respect to the first claim, plaintiffs appear to assert that the relevant market is the type of medical services available at the URI health clinic for LINA-insured students. In support of this market definition, plaintiffs make an incomprehensible declaration: "Obviously there is nothing reasonably interchangeable with the health care available at the URI clinic, as, by their nature, medical services and techniques are highly specialized. For instance, there are no reasonable substitutes for any of the following: x-rays, laboratory tests, gynecological tests, or orthopedic services." Plaintiffs' Original Memorandum at 195.

I recognize that in certain circumstances a single brand of product or service can constitute the relevant market under the Sherman Act. Kodak, 112 S.Ct. at 2090. In the case at bar, however, plaintiffs do not present any facts to show why the relevant market for this §2 monopolization claim should be limited to URI health clinic services for students enrolled in the LINA plan. Under the facts alleged, students voluntarily chose to subscribe to the LINA-URI health care arrangement -- a set-up that provided insurance coverage only if students first visited the URI health clinic. If the LINA-URI option did not appeal to them, they could subscribe to a "comparable" plan with an alternative health care scheme. While the LINA plan was designed to "dovetail" with the URI health clinic services, the amended complaint does not allege sufficient facts to indicate that these "comparable"

plans were not "reasonably interchangeable" with LINA either in cost or in quality of health care coverage. Equally significant in light of Kodak, students were not "locked-in" to the LINA plan they could easily switch carriers at the end of the year.

Thus, based upon amended complaint, the relevant market for plaintiffs' first §2 claim must, at a minimum, include LINA and other "comparable" health care plans available to URI students.[9] In this broader market, plaintiffs have not alleged any facts to indicate a specific intent to monopolize. Indeed, as noted, URI's program enabled the majority of URI students to enroll in non-LINA plans.

Focusing on the second monopolization allegation, plaintiffs suggest that the relevant market is limited to health insurance available to those students "whose health was not already insured elsewhere." This is another attempt by

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[9] This position is supported by one pre-Kodak U.S. District Court case from New York, Metropolitan Life Insurance Co. v. Adler, 1988 U.S. Dist. LEXIS 1146, 1988-1 Trade Cases ¶ 67,907 (S.D.N.Y. 1988). In that case, the defendant, Dr. Adler, brought a §2 antitrust counterclaim alleging that Metropolitan Life Insurance Company sought to limit any competition that could affect its alleged monopoly of group medical insurance for New York State employees. Specifically, Adler charged that Metropolitan Life attempted to deprive members of the insurance plan of the physician of their choice solely to enhance profits and lower costs. 1988 U.S. Dist. LEXIS 1146, at *10. Adler contended that the relevant market for this monopolization allegation was limited to the employees of New York State covered by the plaintiffs' health insurance plans. Id. at *11-12.

The Court dismissed the counterclaim. It found, among other things, that Adler had failed to plead an appropriate market definition. The Court wrote: "...Dr. Adler attempts to allege a monopoly simply by definition of the market. Surely the relevant market cannot be those New York State employees who have opted to subscribe to Metropolitan's health insurance. In such a case, there could be no finding other than one of monopoly." Id. at *12.

plaintiffs to bootstrap an antitrust claim to a narrowly drawn market. But this market definition makes no sense. This subset of students -- if this group can be delineated at all -- was equally free to choose or reject LINA. Plaintiffs have not proffered any facts to indicate that these students were somehow forced into buying the LINA plan, or that they faced different options than other URI students choosing among insurance carriers. Thus, the relevant market for this claim must also be broader than defined by plaintiffs encompassing at least LINA and "comparable" insurance plans. And, once again, there are no facts alleged to show a specific intent to monopolize this type of market.

In sum, none of the federal antitrust allegations state a valid claim. All of these claims are dismissed.

B. Equal Protection Claims

I now examine plaintiffs' federal equal protection claims under the Fourteenth Amendment (Count IX). The gravamen of these claims is that URI and LINA intentionally charged male students the same amount in health clinic fees and insurance premiums as female students, even though a portion of these costs were exclusively spent on medical services for women (e.g., gynecological care). This structure, plaintiffs assert, discriminated against male students on the basis of sex and denied them the equal protection of the law.

The Equal Protection Clause of the Fourteenth Amendment declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The constitutional command "is essentially a direction that all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Even assuming the operations of URI and LINA constituted state-action for purposes of the Fourteenth Amendment, plaintiffs' equal protection claims are meritless.

It is now a bedrock principle that to prove an equal protection claim, a plaintiff must demonstrate that the defendant acted with discriminatory intent or purpose. See Washington v. Davis, 426 U.S. 229, 239-42 (1976); Lipsett v. University of Puerto Rico, 864 F.2d 881, 896 (1st Cir. 1988). And "'[d]iscriminatory purpose'... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)(citation omitted). See also McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

In this case, plaintiffs have not pled any facts to indicate that URI or LINA intentionally discriminated against male students in the imposition of the clinic fees or insurance premiums. Plaintiffs simply complain that URI and LINA were cognizant that a portion of these costs were funneled into women's health services. Indulging all reasonable inferences in favor of plaintiffs, I do not see how this naked allegation states a claim under the Equal Protection clause. As the First Circuit has recently stated:

> To survive a motion to dismiss, an equal protection claim "must 'outline facts sufficient to convey specific instances of unlawful discrimination.'" A plaintiff "may not prevail simply by asserting an inequity and tacking on the self-serving conclusion that the defendant was motivated by a discriminatory animus." Coyne v. City of Somerville, 972 F.2d 440, 444 (1st Cir. 1992)(citations omitted).

In conclusion, without sufficient facts to indicate discriminatory intent or purpose, plaintiffs' federal equal protection claims must be dismissed.

C. Due Process Claims

Plaintiffs also plead separate claims under the Due Process Clause of the Fourteenth Amendment (Count XII). They assert that URI's mandatory clinic fee and insurance requirement deprive students of liberty "to contract" and "of property." Plaintiffs are particularly troubled by URI's policy of automatically billing for LINA if a student did not pick another insurance carrier, and of URI's policy of prohibiting registration if students did not pay their LINA bill.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive property, without due process any person of life, liberty, or of law." Plaintiffs appear to allege a substantive due process violation based upon the right or liberty to contract. They ground this argument on language contained in the 1923 Supreme Court case, Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

> While this court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (emphasis added).

While these are majestic words, since the 1930s the Supreme Court has severely curtailed substantive due process theories based on economic assertions and the right to contract. See Ferguson v. Skrupa, 372 U.S. 726 (1963) (upholding Kansas statute making it a misdemeanor to engage in business of debt adjustment except as incident to practice of law); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)(upholding Washington State statute establishing minimum wages for women); Nebbia v. New York, 291 U.S. 502 (1934)(upholding New York Milk Board's order fixing milk prices for distributors and storekeepers). See also Tenoco Oil Co. v. Department of Consumer Affairs, 876 F.2d 1013, 1021 (1st Cir. 1989)("Since 1937, when 'substantive' due process lost favor, courts have reviewed economic legislation with great deference to the legislature's policies..."). "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust For Southern California, _ U.S. _, 113 S.Ct. 2264, 2287 (1993).

Even assuming URI is a state actor, and assuming further that the factual setting in this case implicates the right to contract, plaintiffs' amended complaint still fails to state a valid substantive due process claim. Plaintiffs fail to allege any facts that URI or LINA acted in an arbitrary or irrational manner. Nor do they cite any specific authority to support their broad assertions of constitutional harm. Simply put, under the broadest reading of the amended complaint, plaintiffs' disfavored economic due process allegations must be dismissed.

IV. Conclusion

In sum, I dismiss with prejudice plaintiffs' federal antitrust, equal protection and due process claims. In the absence of any federal claims, this case lacks original jurisdiction in this Court. Within my discretion, I respectfully decline to exercise supplemental jurisdiction over the remaining state claims. See 28 U.S.C. §1367(c)(3). I wish to emphasize that this ruling in no way reflects on the merits of those state claims. All state law claims are dismissed without prejudice.

SO ORDERED:

Raymond J. Pettine
Senior U.S. District Judge

August 5, 1993

Entered as an Order of this Court August 5, 1993

Deputy Clerk

APPENDIX § C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1988

TONY LEE, ET AL.,

Plaintiffs-Appellants

v.

LIFE INSURANCE COMPANY OF NORTH AMERICA, ET AL.,

Defendants-Appellees

BEFORE

*

ALDRICH, SENIOR CIRCUIT JUDGE,
TORUELLA, SELYA, CYR, BOUDIN AND STAHL,
CIRCUIT JUDGES

ORDER OF COURT

Entered June 16, 1994

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been

carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court

Francis P. Scigliano Clerk

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* Chief Judge Stephen Breyer did not participate

[cc.: Messrs. Banks, Goodman and Proger]

APPENDIX § D

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE C[illegible]

U.S. Const. amend. VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S. Const. amend. IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const. amend. XIV

"*** nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

R.I. Const. Art. VI, §§ 1 and 2

"Section 1. Constitution supreme law of the state. - This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void. The general

assembly shall pass all laws necessary to carry this Constitution into effect.

Section 2. Power vested in general Assembly - Concurrence of houses required to enact laws - Style of laws. - The legislative power, under this Constitution, shall be vested in two houses, the one to be called the senate, the other the house of representatives; and both together the general assembly. The concurrence of the two houses shall be necessary to the enactment of laws. The style of their laws shall be, It is enacted by the general assembly as follows:"

§ 1 Sherman Act, 15 U.S.C. § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

R.I. Department of Business Regulation's Regulation 23 Part XI - Filing of Forms and Rates, §§ 1, 2, and, 3 are promulgated pursuant to Rhode Island General Laws § 42-62-12 and have the purposes stated below.

> "Insurance Regulation 23 was promulgated pursuant to G.L. 195[illegible] (1977 Reenactment) § 42-62-12. That section authorizes the making of regulations for health service contracts. The purpose of the regulations is to establish minimum standards to which all health-benefit

> plans issued, delivered, or offered for sale in Rhode Island must comply. Pursuant to § 42-62-12, the director of the Department of Business Regulation has the authority to promulgate rules and regulations **establishing minimum standards with which insurers must comply in order for their plans to qualify.** Subsection (c) of § 42-62-12 provides that after promulgation of the regulations, **samples of proposed contracts shall be filed with the director for a hearing or other review.** The director shall take affirmative action within a reasonable time to approve, disapprove or modify the proposed form. **The statutory standards governing the director's approval seek to ensure mainly the public's protection against misleading or deceptive practices."** *Formisano v. Blue Cross of Rhode Island*, 478 A.2d 167, 170 (R.I. 1984). (Emphases added.)

DBR's Regulation 23, Part XI, §§ 1, 2, and, 3, in pertinent part:

"Part XI - Filing of Forms and Rates

Section 1.

> No health benefit contract shall be issued or delivered to any person in this state nor shall any application, rider, endorsement, individual certificate, subscriber contract or group master contract to be used in connection therewith be issued or delivered **until** a copy of the form thereof and of the classification of risks and the premium rates or the rating formula have been **approved** by the Director of Business

Regulation. ***

1. No forms *** shall be approved unless such forms are in compliance with this regulation.

***

Section 2.

No such contract shall be issued, nor shall any application, rider, endorsement, individual certificate, subscriber contract, or group master contract be used in connection therewith, until the expiration of sixty (60) days after it has been so filed unless the Director of Business Regulation shall sooner give written approval thereto, ***.

Section 3.

The Director of Business Regulation may ... after filing of any such [policy] form disapprove such form *** (2) if it contains a provision or provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation of such contract. If the Director of Business Regulation shall notify the insurer which has filed any such form that it does not comply with the applicable laws and regulations, it shall be unlawful thereafter for such insurer to issue such form or use it in connection with any contract. ***." Pages 126.55-R to 126.56-R of Regulation 23. (All emphases added.)

Counting distinct campuses separately, there are well over a hundred State universities that have mandatory health services fees. These fees finance the university health clinics and are unisex. Consequently, *hundreds of thousands of State university students pay these mandatory fees*. California[10] and Texas[11] combined have over 50 State universities, and no States, except Delaware, Rhode Island, and Wyoming, have less than two State universities. Most States have many more than two State universities. New York, for instance, has over 20 State universities.[12]

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[10] California State University at: Bakersfield, Chico, Dominguez Hills, Fresno, Fullerton, Hayward, Long Beach, Los Angeles, Northridge, Sacramento, San Bernardino, San Marcos, Stanislaus. Humboldt State University, San Diego State University, San Francisco State University, San Jose State University, Sonoma State University. University of California at: Berkeley, Davis, Irvine, Los Angeles, Riverside, San Diego, Santa Barbara, and Santa Cruz.

[11] Angelo State University, East Texas State University, East Texas State University at Texarkana, Lamar University-Beaumont, Midwestern State University, Prairie View A&M University, Sam Houston State University, Southwest Texas State University, Stephen F. Austin State University, Sul Ross State University, Tarleton State University, Texas A&M University, Texas A&M University at Galveston, Texas A&M University-Corpus Christi, Texas A&M University-Kingsville, Texas Southern University, Texas Tech University, University of Houston, University of Houston-Clear Lake, University of Houston-Downtown, University of Houston-Victoria, University of North Texas. University of Texas at: Arlington, Austin, Brownsville, Dallas, El Paso, San Antonio, and Tyler. University of Texas-Pan American.

[12] The statistics are based on data supplied to Peterson's Guides, Inc. by the universities themselves, and reproduced in "Peterson's Guide to Four Year Colleges 1995", © 1994.

Quoted and/or cited below are various State laws that prevent or impede members of one sex from buying health insurance that excludes coverage solely useable by the opposite sex.

Montana Code Ann. § 49-2-309(1)

"It is an unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension retirement plan, program or coverage, including discrimination in regard to rates or premiums and payments or benefits."

Nevada Stat. Title 57, ch. 689A, § 689A.0405(1)

"A policy of health insurance must provide coverage for benefits payable for expenses incurred for:

(a) An annual cytologic screening test for women 18 years of age or older;
(b) A baseline mammogram for women between the ages of 35 and 40; and
(c) An annual mammogram for women 40 years of age or older."

The National Association of Insurance Commissioners, NAIC, has drafted a so-called "Model Regulation to Eliminate Unfair Sex Discrimination". Many States have responded to said regulation by adopting it in whole or by

passing similar legislation[13]. Related legislation or regulations have also been become law in several other States[14]. Under this NAIC regulation normal pregnancy is not regarded as a sickness or injury, but, the regulation prohibits insurers from "treating complications arising from pregnancy differently from other forms of illness or sickness covered by an insurance contract"[15]. Males cannot possibly suffer from complications arising from pregnancy, and so such a regulation violates the Equal Protection Clause if the students' position is correct. Another prohibited practice under the NAIC regulation is "*** excluding benefits relating to coverage involving the genital organs of one sex only"[16]. Again, this violates the Equal Protection Clause if the

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[13] The NAIC currently lists the following as the adopting States: **Ariz.** Admin. Comp. R4-14-209 (1977), **Ark.** Ins. Rule & Reg. 19 (1985), **Cal.** Admin. Code tit. 10 §§ 2560 to 2560.6 (1973), **Fla.** Admin. Code § 4-43.001 (1978), **Ill.** Admin. Reg. tit. 50 §§ 2603.10 to 2603.60 (1976), **Iowa** Admin. Code §§ 191-15.50 to 191-15.54 (1978), **Kan.** Admin. Regs. § 40-1-31 (1977/1986); Bulletin No. 1977-3, **Mo.** Rev. Stat. § 375.995 (1986), **Mont.** Ins. Dept. reg. §§ 6.6.1202 to 6.6.1203 (1979), **Neb.** Admin. R. tit. 210 ch. 28 (1977), **Nev.** Ins. Reg. § 686A.110 to 686A.150 (1977), **N.C.** Admin. Code tit. 11 ch. 4 § 0317 (1979), **N.D.** Admin. Code §§ 45-03-10-01 to 45-03-10-04 (1988), **Okla.** Ins. Regs. § 365:10-1-9 (1993), 31 **Pa.** Admin. Code. §§ 145.1 to 145.5 (1977), **S.D.** Codified Laws Ann. §§ 58-33-13.1 to 58-33-13.2 (1980) (Part of model), **Tenn.** Ins. Rules ch. 0780-1-34 (1976), **Tex.** Admin. Code §§ 21.401 to 21.409 (1978/1985), **Utah** Ins. R590-83 (1980/1989), and, **Wis.** Admin. Code § Ins. 6.55 (1976).

[14] The NAIC currently lists the following as these other States: **Mich.** Comp. Laws § 500.2027 (1977), **Minn.** Stat. § 62E.08 (1982), **N.J.** Admin. Code tit. 11 §§ 1-4.2 to 1-4.3 (1975/1986), **N.Y.** Ins. Reg. § 52.41 (1983); N.Y. Ins. Law § 2607 (1984), **Or.** Admin. R. §§ 836-80-050 to 836-80-060 (1975), **Vt.** Admin. Comp. Ins. Dept. R. I-89-1 (1989) (Maternity coverage must be provided), and, **Wash.** Rev. Code. § 48.30.300 (1975-76).

[15] ¶ 6 NAIC Model Regulation Service, 160-1 (January 1977).

[16] ¶ 7 NAIC Model Regulation Service, 160-1 (January 1977).

students' position is correct.

Potential effect on States' Equal Rights Amendments

At least 18 States have Equal Rights Amendments to their respective State Constitutions. All of these Amendments would be affected by a holding that every person has a federal Equal Protection right freely to buy health insurance that excludes coverage solely useable by the opposite sex. The language of all 18 Amendments is such, that, all 18 Amendments fairly and reasonably *could* be construed consistent with that holding. If the Court makes that holding, these Amendments *should* be so construed by the States, to preserve their federal constitutionality.

These 18 ERA Amendments are in: Alaska[1], Colorado[2], Connecticut[3], Hawaii[4], Illinois[5], Louisiana[6],

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[1] Alaska Const. art. 1, § 3. "No person is to be denied the enjoyment of any civil or political right because of *** sex ****"

[2] Colo. Const. art. 2 § 29. ""Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex ***."

[3] Conn. Const. art. I, § 20. "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of *** sex ***."

[4] "Equality of rights under the law shall not be denied or abridged by the State on account of sex ***." Hawaii Const. art. I, § 3. "No person shall be *** denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of *** sex ***." Hawaii Const. art. I, § 5

[5] Ill. Const. art. I § 18. "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."

Maryland[7], Massachusetts[8], Montana[9], New Hampshire[10], New Mexico[11], Pennsylvania[12], Rhode Island[13], Texas[14],

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[6] La. Const., art. 1, § 3. "No person shall be denied the equal protection of the laws. *** No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of *** sex ****"

[7] Md. Const. declaration of rights, art. 46. "Equality of rights under the law shall not be abridged or denied because of sex."

[8] Mass. Const. pt. 1, art. 1. "**** Equality under the law shall not be denied or abridged because of sex, ****"

[9] Mont. Const. art. II, § 4. "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of *** sex ****"

[10] N.H. Const. pt. 1, art. 2. "All men have certain natural, essential, and inherent rights - among which are: the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of *** sex ****"

[11] N.M. Const. art. II, § 18. " *** nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. ****"

[12] Pa. Const. art. 1, § 28. "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

[13] R.I. Const. art. 1, § 2. "**** nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of ** gender *** be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."

[14] Tex. Const. art. 1, § 3a. "Equality under the law shall not be denied or abridged because of sex ***.

Utah[15], Virginia[16], Washington[17], and Wyoming[18].

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[15] Utah Const. art. IV, § 1. "The rights of citizens of the State of Utah to vote and hold office shall not be abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."

[16] Va. Const. Art. I, § 11. "*** the right to be free from any governmental discrimination upon the basis of *** sex *** shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination."

[17] Wash. Const. art. XXXI, § 1. "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."

[18] Wyo. Const. art. 6, § 1. "The rights of citizens of the State of Wyoming to vote and hold office shall not be abridged on account of sex. Both male and female citizens of this state shall enjoy all civil, political and religious rights and privileges."